(25,592)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 762.

SEABOARD AIR LINE RAILWAY, PLAINTIFF IN ERROR,

vs.

J. H. LORICK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 18, 1916.

1 First Appeal.

THE STATE OF SOUTH CAROLINA:

In the Supreme Court, Eleventh Circuit—Lexington County, April Term, 1915.

Before Hon. R. W. Memminger.

J. H. LORICK, Plaintiff-Appellant,
against
SEABOARD AIR LINE RAILWAY, Defendant-Respondent.

Messrs. Frank G. Tompkins and George Bell Timmerman, Esquires, Attorneys for Plaintiff-Appellant.

Lyles & Lyles and C. M. Efird, Esquires, Attorneys for Defendant-Respondent.

CASE AND EXCEPTIONS.

Statement.

This case was commenced by service of summons and complaint on May —, 1914, in which complaint it was alleged that on or about the 7th day of May, 1913, the plaintiff was employed by the
2 defendant as a car inspector, with duties in the City of Columbia and at Cayce, Lexington County, South Carolina, and on the said date he was engaged in repairing a coupler to a car marked "Rutland—5263-B." That he took charge of this car and commenced to repair it, for these defects, on account of which a connecting road had refused to receive it.

The case came on to be heard by his Honor, Judge R. W. Memminger, at Lexington Court House, on February 4th, 1915.

As it has no particular bearing on the questions here raised, the medical testimony has been omitted from the Case for Appeal, with the exception of a statement that Dr. C. E. Owens had examined the plaintiff's injury, and found that he had suffered a serious fracture and injury to his shoulder which was of a permanent nature.

At the close of plaintiff's testimony the defendant's attorney made a motion for a nonsuit under the Federal Employers' Liability Act, on the grounds shown by the record, which was granted and from which this appeal was taken.

Complaint.

The plaintiff above named, complaining of the defendant herein, alleges:

I. That the plaintiff is informed and believes and alleges that

Seaboard Air Line Railway is, and was at the times hereinafter mentioned in this complaint, a corporation, duly organized under and by virtue of the laws of the State of South Carolina, and Virginia, with the capacity to sue and be sued and is a common carrier by railroads of goods, passengers, express and mail for hire and engaged in interstate commerce and traffic between the States of Virginia, North Carolina, South Carolina and Georgia, and owns and operates,
3 and at the times mentioned in this complaint owned and operated, a line of railroad extending from Portsmouth, in the State of Virginia, to Savannah, in the State of Georgia, and running and passing through Columbia, in the State of South Carolina, from the said points of Portsmouth, Virginia, and Savannah, Georgia, together with tracks, side tracks, cars, roadbed, steam locomotive engines and the appliances and appurtenances usually incident and appertaining to the operation of an interstate railway; and the defendant now maintains offices and agents, and a railroad yard at Cayce, in the said County of Lexington, State of South Carolina, for the transaction of its business.

II. That at the times hereinafter mentioned, the said plaintiff, J. H. Lorick, was in the employ of Seaboard Air Line Railway as Chief Car Inspector, and in the prosecution of his business was located at the joint yard in Cayce, Lexington County, State of South Carolina, a station on the said line of railway, and the employment of said J. H. Lorick included interstate works, and required him to come into the City of Columbia and to do work for the defendant at the said place.

III. That the plaintiff's duties required him to inspect and make minor repairs on cars being moved by the said Seaboard Air Line Railway, and as such was required and did inspect and make repairs on cars used by the said railway in the transaction of its interstate business, and cars which were passing through the City of Columbia between the said points of Portsmouth, Virginia, and Savannah, Georgia.

IV. That on or about the 7th day of May, 1913, a box car, marked "Rutland R-5263-B," having been refused by the Southern Railroad Company, on account of defective draft bolts and low coupler, was turned over to this plaintiff, by the defendant, to make such repairs to the draft bolts and coupler as would enable said defendant
4 herein to deliver the same in accordance with law to the Southern Railroad Company, as required by the routing of said car, which car was routed out of the City of Columbia, and the State of South Carolina, and that thereupon the plaintiff herein took charge of the same at the joint yard and commenced to repair the defects for which it had been refused.

V. That at the said time, the plaintiff was not furnished with a jack, or jacks, to raise such a defective coupler with; and previous to that time he had made demand upon the servants and employees of the defendant railway company, charged with that duty, to furnish him with a jack, or jacks, suitable for raising such couplers, which work was frequently and was often done by him, and the said agents and employees of the said defendant railway had then and

there, and within a reasonable time before this injury, promised to furnish him such, but that the same were never furnished to him; and in order to make the repairs which were necessary, the proper, safe and reasonable way was to raise them with such a jack or jacks, but the plaintiff not having such equipment found it necessary to raise the same by putting his shoulder under it and pushing it up in that way.

VI. That while raising this coupler by placing his shoulder under the coupling, the plaintiff fractured his shoulder-blade, injured and broke the ligaments in his shoulder, and injured and bruised his arm.

VII. That the injuries, wounds and bruises to this plaintiff aforesaid were caused by the negligence of the defendant, its agents and servants acting in the scope of their duties, at the time and place, and in the manner aforesaid, while the plaintiff was engaged in interstate commerce for and with the defendant herein.

VIII. That by reason thereof the plaintiff was for a long time unable to do any work whatsoever, was put to great expense, trouble and pain and has been, and will be unable to ever use his arm and shoulder again in the way in which he could before the accident, and that he has been permanently injured thereby.

Wherefore, plaintiff prays judgment against the defendant in the sum of twenty-five thousand dollars ($25,000), and for the costs of this action.

FRANK G. TOMPKINS,
Attorney for Plaintiff.

May 16, 1914.

Answer.

The defendant, by way of amended answer to the complaint herein:

For a First Defense.

Denies each and every allegation therein contained.

For a Second Defense.

Alleges that plaintiff had been for a long time in the employ of defendant as a car inspector and repairer, engaged in the work of inspecting and repairing cars, and well knew the proper method of making or having made the repairs on cars which were too heavy for him to do, or for which he did not have the proper appliances, and plaintiff well knew the danger of attempting to raise a heavy coupler by attempting to raise same with his shoulder, and the dangers and risks of such improper and unsafe method were open and obvious and were well known to plaintiff, or by ordinary diligence could have been ascertained, and notwithstanding this, plaintiff voluntarily and without protest or objection undertook to do this work in this improper and dangerous manner, and consequently

assumed the risks and dangers incident thereto, which caused the injuries of which he now complains.

6 For a Third Defense.

Plaintiff voluntarily undertook a dangerous method of doing his work, to wit, raising a coupler by lifting it with his shoulder, when he knew, or by ordinary diligence could have known, that this method was dangerous, and when a proper and safe method was available, as plaintiff well knew or by ordinary diligence could have ascertained, and plaintiff endeavored to do this work without efforts to secure proper appliances, which were available, and in so doing and failing to do, plaintiff was guilty of negligence, which combining and concurring with the negligence of the defendant, if it was negligent, operated as a proximate cause of his own injuries.

Wherefore, having fully answered, plaintiff prays that the complaint be dismissed.

C. M. EFIRD,
LYLES & LYLES,
Attorneys for Defendant.

Testimony.

It is admitted that Dr. C. E. Owens testified that he examined the plaintiff shortly after the accident and again shortly before the trial, and that he had sustained a serious injury, of a permanent nature, to his shoulder, consisting of a fracture and other serious bruises and strained ligaments.

S. G. ELDERS, sworn:

Direct examination by Mr. Thompkins:

Q. What business are you engaged in?
A. Firing a stationery boiler for the Southern Railway.
Q. Where?
A. At the Union Station.
Q. Where were you working on the 7th day of May, 1913?
A. I do not remember right now.
Q. Had you ever worked for the Seaboard at all?
A. I worked for them about three years.
7 Q. Do you know Mr. Lorick?
A. Yes, sir.
Q. Did you ever do any work as car inspector?
A. Where?
Q. On any railroad?
A. Yes, sir; I was car inspector's helper at the Seaboard and then I got a repairer's job.
Q. What kind of an instrument do they use to raise up the couplings?
A. They use a jack to jack it up and put bolts in it.
Q. Is that the best and safest way?

Mr. Lyles: We object to the witness being allowed to give his opinion about an ordinary matter, which is purely for the jury to form an opinion about.

The Court: He has to state all the facts.

Mr. Tompkins:

Q. Who had charge previous to the time that Mr. Lorick was hurt, who had charge of the car inspectors for the Seaboard?

A. Mr. F. N. Jones.

Q. Did you ever hear, previous to his injury, Mr. Lorick ask him to furnish him jacks for that work?

Mr. Lyles: The witness has said that he did not know whether he was working for the Seaboard at or about the time alleged in the complaint or not; there must be some degree of certainty, or some reasonable relation between the time in question.

The Court: Try and find the time with some degree of certainty?

Mr. Tompkins:

Q. Did you hear a conversation between Mr. Lorick, the plaintiff, and Mr. F. N. Jones, with reference to some jacks?

A. Yes, sir.

Q. How long was that before Mr. Lorick was hurt?

A. I do not remember how long it was; but I heard him ask for the jacks.

The Court: Give us some reasonable time as to when it was; whether it was one year or twenty years before he was hurt.

A. It was not twenty years; it was not six months.

Mr. Tompkins:

Q. It was not as long as six months?

A. No, sir.

8 Q. What did you hear Mr. Lorick say to Mr. Jones in regard to it?

Mr. Lyles: We object because we do not think a sufficient relation has been shown as to time.

The Court: That is a question for the jury, I think.

Mr. Tompkins:

Q. What did you hear Mr. Lorick say to Mr. F. N. Jones, chief car inspector at that time?

A. About the jacks?

Q. Yes?

A. He just asked for jacks to take to the joint yard to raise the couplers with.

Q. You did not see this acident, did you?

A. No, sir.

Q. Did you see Mr. Lorick shortly after that?

A. I saw him when he was hurt.

Q. You saw him when he was hurt?
A. Yes, sir.
Q. Where was he hurt?
A. He told me he was hurt in the shoulder——

The Court: Don't tell that.

Mr. Tompkins:

Q. Did he have his arm in a sling?
A. Yes, sir.
Q. Which arm?
A. His left arm.
Q. How long was that after the 7th day of May, when it is alleged he got hurt?
A. I do not remember how long it was; I never kept any time of it.
Q. What did Mr. Jones say to Mr. Lorick about those jacks?
A. He told him that he did not have any.
Q. State whether or not he promised to get them for him as soon as he could, or later on?

Mr. Lyles: I think it would be better to ask him what the conversation was.
The Court: Ask him to state whether or not.

Mr. Tompkins:

Q. Did he say anything besides that?
A. He just said they did not have any.

Cross-examination by Mr. Lyles:

Q. We have seen each other before?
A. Yes, sir.
9 Q. And you testified against the Seaboard over in Columbia?
A. No, sir; I did not testify against them; I testified the whole truth.
Q. Did you not testify in the Aull case against them in Columbia?
A. I just told what I knew.
Q. You told them in that case that you had it in for Mr. Jones.
A. No, sir.
Q. I am going to put you on notice now; did you not swear that in the Geo. H. Aull case?
A. I remember the case.
Q. Don't you remember when Mr. Aull claimed that he was a car inspector and got hurt about the jacks, and you testified that Mr. Jones fired you; did you not admit to me, under oath, that you had it in for Mr. Jones; I want you to answer that question; did you not say when you were being examined in that case, as a witness on that trial, that Mr. Jones had fired you and you had it in for him?
A. Yes, sir; and I have it in for him yet, too.
Q. You have it in for him yet?
A. Yes, sir; but I have not got it in for the Seaboard.
Q. You are getting to be an expert witness.

A. That is what they summoned me for.
Q. You have the reputation of being a good testifier?
A. When they summons me on a case I have got to come.
Q. And you bring the stuff with you?
A. I bring what I know.
Q. And something more, too, sometimes?
A. No, sir.

F. V. GREENE, sworn:

Direct examination by Mr. Tompkins:

Q. What position do you hold in Columbia?
A. Joint yardmaster for the Southern, Seaboard and Coast Line.
Q. Do you recall the time when Mr. Lorick got his shoulder hurt in the joint yard there?
A. I do not recall the time when he got hurt; I recall after the time when he claims to have gotten hurt; I do not know the time he did get hurt.
Q. Were there any jacks in use there for the car inspectors at that time?
A. I could not answer that, because Mr. Lorick reported to Mr. Jones, at that time, who was the foreman at Cayce; I did not keep up with the equipment (I worked for the transportation department) and he worked for the mechanical department.
Q. You will swear that you do not know?
A. I could not swear there were any jacks there; I could not swear either way.
Q. Did you see any there?
A. No, sir; I did not see any there.

No cross.

J. H. LORICK, sworn:

Direct examination by Mr. Tompkins:

Q. Where do you live?
A. At Blythewood.
Q. In Richland County?
A. Yes, sir.
Q. Where are you living now?
A. At the same place.
Q. Where were you living May 7, 1913?
A. Columbia.
Q. What kind of work were you engaged in?
A. Car inspector.
Q. How long had you been working for the S. A. L. at that time?
A. Close to five years; something over five years.
Q. Where did you start?
A. I started with the Southern Railroad.
Q. What doing?
A. Car repairing.

Q. What were you getting when you first started to work for the Southern Railroad?

A. Thirty-five dollars a month.

Q. How much were you getting when you were hurt on the 7th day of May, 1913?

A. Eighty dollars a month, straight time.

Q. Straight time?

A. Yes, sir.

Q. Did you make any overtime?

A. Yes, sir.

Q. How much overtime would you average?

A. Sometimes I would make five, six, eight or ten dollars a month overtime a month.

11–15 Q. After you were working for the Southern Railway as a car inspector, what position did you next get?

A. Car inspector for the Seaboard.

Q. How long had you been working on that job?

A. Nearly five years with the S. A. L.

Q. What kind of work were you doing as car inspector, as you alleged?

A. You had to inspect all the cars coming to you, and you had to inspect all cars going out at the S. A. L. at the joint yard; you had to inspect all cars coming into the S. A. L. and all cars going from them to other roads, and if the other car inspector demanded it you were supposed to fix them up.

16–20 Mr. Tompkins: All right; he has testified that it is out of this State. What repairs were you making?

Q. What repairs were you making?

A. The draft bolt was raised, the coupler.

Q. What tools did you need to raise that coupler with?

A. I nedeed a jack.

Q. Who was your boss man there?

A. Mr. Jones.

Q. Had you ever asked him for a jack?

A. Yes, sir.

Q. How many times?

A. So many times I don't know; I guess forty or fifty times.

Q. Had he ever promised to give you a jack for that work?

A. Yes, sir.

Q. How long before you were hurt was it that he promised you the last time?

A. Something like three weeks.

Q. What did he say?

A. He said he did not have any at the time and that he would get them and send them to me.

Q. Not having a jack, how was the only way you could raise that coupler?

A. Get under it and raise it with your shoulder, unless you had help.

Q. Did you do that?

A. Yes, sir.
Q. State what effect it had on you?
A. I had to squat down in front of the coupler to get a raise on it, and raise it up and make it the standard height so that the Southern Railroad would accept it; I had to raise the coupler high enough so that it would be standard so that the Southern Railroad would accept; they had refused it.
Q. They would not accept it until you made it standard?
A. No, sir.
Q. Did it hurt your shoulder?
A. Yes, sir; when I raised the draw head, my arm felt like it went to sleep; I had put the bolt in before I raised the coupler; and my arm felt like it went to sleep, and I did not do anything more, but take the car numbers; when I went home my arm hurt me like it was sprained, and when I came back I told the inspector I had hurt my arm.
21 Q. You were working in the joint yards in Columbia?
A. Yes, sir.
Q. Tell me, for my own information, what are they—you call them the joint yards—where are they located?
A. At Granby, at the Olympia Cotton Mill.
Q. Down this way?
A. North.
Q. It is southwest from the Seaboard passenger station?
A. Yes, sir.
Q. In May, 1913, had the yards at Cayce been developed, and you had the yard at Elm Park?
A. The side tracks were there.
Q. Where were you living at that time?
A. In Columbia, on the corner of Taylor and Gadsden streets.
Q. Which way did you walk going to and from your work?
A. I did not have any certain way.
Q. Which was your usual way to go?
A. Through the C. & G. yards most of the time.
22–24 Q. Through the Southern yards there?
A. Yes, sir.
Q. Where is Gadsden street?
A. Sorter southeast.
Q. You were entrusted with the responsibility of inspecting the cars in the joint yard?
A. Yes, sir.
Q. That was your business?
A. Yes, sir.
Q. Where was Mr. Jones working at this time?
A. At Cayce.
Q. Mr. Jones was not there with you at the time you were hurt?
A. No, sir.
Q. Mr. Jones was the man above you that you had to deal with?
A. Yes, sir.
Q. He was the man you reported to and who gave you your instructions?

A. Yes, sir.
Q. This drawhead, tell us what that is?
A. It is the drawhead that pulls the cars.
Q. I don't know, and I don't know whether the jury knows; is it that bumper on the end of the car?
A. Yes, sir; some call it the bumper and some call it the drawhead.
Q. It runs back up under the car?
A. Yes, sir.
Q. About how long is the whole business?
A. There are five-inch couplers on some; it is in different sizes, and they have some 20-inch, 30-inch and 40-inch yoke.
Q. It is practically a piece that runs back under there?
A. Yes, sir.
Q. How long was the one you were working on?
A. I do not know exactly.
Q. That is all one big piece of iron or steel?
A. Yes, sir, the yoke is supposed to follow the spring in this yoke.
Q. And this one had fallen down?
A. No, sir; just the end of it.
Q. The end of it?
A. Yes, sir.
Q. It was not straight out?
A. No, sir.
Q. It came down?
A. Yes, sir.
Q. Your work was to put it up so it would stay?
A. Yes, sir.

25 Mr. Tompkins:

Q. Who told you to go and fix that car?
A. Mr. Jones told me to make repairs of all cars in bad order.
Q. He knew that you did not have a jack at all?
A. Yes, sir.
Q. Now, suppose you had refused to do that——

Mr. Lyles: We object to that.
Mr. Tompkins: Then if you object, I will not ask it.
The Court: That is one objection that is well taken.

Mr. Tompkins:

Q. About how often, in the execution of your work, did you find it necessary to raise one of those couplers, when you needed a jack?
A. Sometimes once a week and sometimes once every two weeks.
Q. It did not come up very often?
A. No, sir.
Q. Did you have any training to do any other work but railroad work?
A. No, sir.
Q. Have you been able to get any work that you were able to do?
A. Not yet.

Q. And what is the only thing you have been able to do?
A. Piddle about at home and work about on the farm, or something like that.

Mr. Lyles:

Q. You say these cars came into the interchange yard from other roads?
A. Yes, sir.
Q. And you did not know what cars were coming in?
A. No, sir.
Q. They were put off one track to another track?
A. Yes, sir.
26 Q. It was your business to go around and inspect them?
A. When they are pushed in there.
Q. You did not know what cars were coming in?
A. No, sir.
Q. And you did not know what cars would be sent out?
A. The switch engine always shoved them in there from the other roads.
Q. And the switch engine switched them in there and left them?
A. Yes, sir.
Q. And you went over them and inspected them?
A. Yes, sir.
Q. That was your business, to find out what was wrong?
A. I was supposed to find out what was wrong and make the C., N. & L. and the Southern fix them; they were supposed to fix our cars if they were in there.
Q. Your duty was to keep them repaired?
A. The Seaboard would switch cars over there to go to the Southern, A. C. L., or C., N. & L., and they had instructions to send them back——
Q. And they would send them back to you?
A. Yes, sir; if they were in bad order I had to fix them up before they would be accepted.
Q. And if you could not do the work you sent them to the shops?
A. Yes, sir.
Q. What I mean is, you did not know what cars you were going to be called on to work upon?
A. No, sir.
Q. Mr. Jones, you say, was staying at Cayce at the time?
A. Yes, sir.
Q. And Mr. Jones did not know what cars you were to work on or what you were to do?
A. No, sir.
Q. And then you reported to Mr. Jones what you had done?
A. Yes, sir.
27 Plaintiff rests.

Mr. Lyles: I think we are clearly entitled to a nonsuit in this case under the Federal Act,—that is, the Federal Employers' Liability Act, on the ground of assumption of risks. It appears that the plain-

tiff himself was in the best position to know of the danger or risk that he incurred by attempting to raise this piece of iron with his shoulder. There is no evidence in this case of any compulsion for him to do work that he knew was dangerous. There is no evidence that he was working under the immediate direction of a superior officer.

(The motion was argued.)

The Court: I do not think that I can say that the plaintiff has any case at all; if there is anything in the assumption of risks, here is plain, straight case of it. Here is a man that goes ahead, without the appliance to do the work, yet nevertheless goes ahead and does the work with full knowledge that it is dangerous and that he did not have the appliance. That is perfectly patent and perfectly obvious.

Mr. Tompkins: Under the law, where a party demands the tools, and they are promised to him in a reasonable length of time, and are not furnished, you can not hold him responsible.

The Court: Unless there was some special emergency; if there had been some special emergency, then that would be a question for the jury whether he was justified in obeying the order of the master. In my judgment, under no possible view of the case could the plaintiff, recover, and there would be nothing for me to tell the jury but that beyond any peradventure that he assumed the risks.

Mr. Tompkins: Will your Honor listen to this; there is a man who says that he was engaged to do this particular work, and has to do it every week, or possibly every two weeks; he was put there to do this particular class of work.

28 The Court: In my opinion the plaintiff in this case has absolutely no case, and I think this nonsuit is proper. I will grant the order of nonsuit. Now, gentlemen of the jury, as I consider it there is nothing for you to pass upon, and I have ordered that a nonsuit be entered, because I do not think the plaintiff has any case at all. Here is a man who goes to work and puts his shoulder under this bumper to raise it up, and in trying to raise a weight which he could not raise, and sprained his shoulder, and under our law he is not entitled to recover. There is no use to submit the case to you, gentlemen.

The nonsuit is ordered.

Order of Presiding Judge.

"This was a motion for a nonsuit at the conclusion of plaintiff's testimony, upon the ground stated and taken down by the stenographer. It is

"Ordered that the motion be, and the same is hereby, ordered upon the ground and for the the reasons stated in the record.

"(Signed) R. W. MEMMINGER,
"Circuit Judge.

"February 9th, 1915."

Notice of Appeal.

Within ten days after the said order and any judgment entered or to be entered in consequence of the same, notice of appeal was served on counsel for defendant.

Thereafter judgment was duly entered on said order.

29 *Exceptions.*

That the presiding Judge erred in granting the nonsuit herein, in that the evidence showed facts which ought to have been submitted to the jury for their determination. The testimony showed:

(*a*) That all of the circumstances of the case had been proven by the witnesses to the accident.

(*b*) There was testimony that it was customary for such employees as the plaintiff to be furnished with a jack which was necessary to the proper and reasonably safe performance of the work in question.

(*c*) That plaintiff had repeatedly notified the master of the need of a jack for this work and asked that one be furnished him.

(*d*) That the master had promised to furnish plaintiff with said jack within a reasonable time before the accident.

FRANK G. TOMPKINS,
GEO. BELL TIMMERMAN.
Attorneys for Plaintiff-Appellant.

Columbia, S. C., May 6, 1915.

It is agreed that the above shall constitute the Case for Appeal and return herein, and that the same be filed for hearing at the spring term of the Supreme Court.

FRANK G. TOMPKINS,
Attorneys for Plaintiff-Appellant.
LYLES & LYLES,
Attorneys for Defendant-Respondent.

May —, 1915.

30 Second Appeal.

THE STATE OF SOUTH CAROLINA:

In the Supreme Court, Eleventh Circuit,—Lexington County, November Term, 1915.

Hon. Thomas S. Sease, Circuit Judge.

J. H. LORICK, Plaintiff-Respondent,
vs.
SEABOARD AIR LINE RAILWAY, Defendant-Appellant.

F. G. Tompkins, Geo. Bell Timmerman, Attorneys for Plaintiff.

C. M. Efird, Lyles & Lyles, Attorneys for Defendant.

CASE WITH EXCEPTIONS.

Statement.

This is an appeal from a judgment of $1,500.00, entered on the verdict of a jury at the November, 1915, term of the Court of Common Pleas for Lexington County. The case was first tried
31–34 before Circuit Judge, Hon. R. W. Memminger, at the February, 1915, term of Court, resulting in an order and judgment of nonsuit. From this the plaintiff appealed and the Supreme Court reversed the judgment below and remanded the case for a new trial. Lorick vs. Ry., 102 S. C., 275 (A. S., No. 3).

The complain-t sought to recover damages for personal injuries alleged to have been sustained by the plaintiff while employed by the defendant as a car inspector in interstate commerce at Columbia on the 7th of May, 1913. The answer, in addition to a general denial, set up the defenses of contributory negligence and assumption of risks, and the appeal raises only the two questions as to whether a verdict should have been directed below in favor of defendant, upon the grounds:

1. That there was no evidence of negligence.
2. The only inference from the testimony was that plaintiff assumed the risks.

Pleadings.

"The Complaint and the Answer were the same as on the first appeal and are correctly printed in the Case and Exceptions on the first appeal."

35 TESTIMONY.

(All of the testimony is omitted excepting that bearing on the question of liability.)

Plaintiff's Testimony.

J. H. LORICK, sworn.

Direct examination by Mr. Tompkins:

Q. Where do you live?
A. Blythewood.
Q. In what county?
A. Richland.
Q. On or about May 7, 1913, where were you engaged at work?
A. With the Seaboard in Columbia.
Q. What kind of work were you doing?
A. Car inspector.
Q. As car inspector, where did your duties call you?
A. To the joint yard in Columbia.

The Court: Where is that?
A. In Columbia.

Mr. Tompkins:

36 Q. Where are the Seaboard headquarters for that kind of work?
A. At Cayce.
Q. In Lexington County?
A. Yes, sir.
Q. Now, explain to the jury what the duties of the car inspector were at that time?
A. They were supposed to inspect all cars coming in and going out of the yard.
Q. For what?
A. To look and see if there were any bad orders, and if there were any bad orders, to cut them out of the train.
Q. There is a federal law about moving defective cars, is there not?
A. Yes, sir.

Mr. Lyles: We object.
The Court: Yes, sir.

Mr. Tompkins:

Q. What were your instructions with regard to the violation of that law when it came in with a low coupler?
A. We were supposed to fix them before the cars would be switched.
Q. Why?

A. Because it was a United States safety appliance law if a car had a low coupler it could not be moved.
Q. If it was one that the repairs could be made on the spot?
A. Yes, sir.
Q. Where does the Seaboard road run from?
A. It runs from Savannah to Jacksonville, Florida.
Q. And then where?
A. That is as far as I know.
Q. Does it go to Portsmouth, Virginia?
A. Yes, sir.
Q. And through the State of North Carolina?
A. Yes, sir.
Q. And goes on through this State into the State of Georgia?
A. Yes, sir.
Q. What kind of trains do they run on that road, what business are they engaged in?
A. They run cars over the road.
Q. Carrying passengers for hire?
A. Yes, sir
Q. And also carrying freight?
A. Yes, sir.
37 Q. State whether or not they were engaged in carrying passengers and freight from one State to another, and from North Carolina through this State into Georgia?
A. Yes, sir.
Q. As car inspector, did you have to make these repairs, these simple repairs, that could be made?
A. Yes, sir.
Q. State whether or not you had to make them on cars engaged in interstate as well as intrastate traffic?
A. Yes, sir.
Q. When you came to this particular car, Rutland R-5263-B, where did you get that car?
A. It came from Cayce.
Q. By the Seaboard?
A. Yes, sir.
Q. Where was it routed?
A. It was delivered to the Southern Railway there.
Q. What routing was on the car?
A. Home routing.
Q. What is meant by that?
A. Meant to send it home to the Rutland Railway.
Q. Where is the Rutland Railroad?
A. In the Northern States.
Q. Up around New York, or somewhere in there?
A. Yes, sir.
Q. In the Northern States?
A. In the Northern States.
Q. In other words, that car was routed out of this State?
A. Yes, sir.
Q. It was an empty?

A. Yes, sir.
Q. Why did you not give it to the Southern?
A. They refused it.
Q. Why?
A. It had a low coupler and the draft bolts were broken.
Q. What then became necessary to be done before they would take it?
A. I had to repair the car before they would take it.
Q. Why did you not take it to the shops?
A. There were no shops over there.
38 Q. Did you have a right, under the instructions you had, to carry it to the shops at Cayce?
A. No, sir.
Q. You had to make the repairs right there?
A. Yes, sir.
Q. What kind of tools were necessary to properly and safely raise that coupler and fix those draft bolts?
A. Jacks.
Q. One of those things that you turn around and raise things up with?
A. Yes, sir; the same as the section masters have we are supposed to have, the jacks with a lever.
Q. Did you have one of those?
A. No, sir.
Q. Had you ever asked your foreman, for one?
A. Yes, sir.
Q. Who was your foreman?
A. Frank Jones.
Q. You had asked him for one?
A. Yes, sir.
Q. State whether or not he had promised to give you one?
A. Yes, sir.
Q. Had he given it to you?
A. No, sir.
Q. About how long before this accident was it you asked him for a jack?
A. It was about a month or something like that.
Q. About how often was it necessary for you to have a jack to fix those things, about how often did these things pull out?
A. Sometimes it would be several weeks before you would need one, and then sometimes two or three weeks at a time.
Q. Not having these jacks, what did you do?
A. I squatted down in front of the coupler and raised it up.
Q. How?
A. With my shoulder, and put on a carry-on, a piece of iron, underneath it, to raise it high enough.
Q. What happened to you as you raised it up?
A. After I raised it up with my shoulder, my arm looked like it went to sleep, and I rubbed out the bad order marks on the car, and then my left arm felt like it went to sleep, and I went on the rest of the day, and that night it got to paining me like it was

sprained, and I came back to work the next day and could
39 hardly use it, and the next morning Mr. Jones came over and I told him I sprained my arm.

Q. Who was Mr. Jones?

A. The foreman.

Q. What are his initials?

A. F. N. Jones; I told him I sprained my arm, and he said I had better go to a doctor, and he told me to come to the office and get a note and carry it to the company's doctor, and I got the note and went to Dr. Weston.

Q. Did Dr. Weston treat you?

A. Yes, sir.

Q. He is the Seaboard doctor?

A. Yes, sir.

Q. How long did he treat you?

A. Something like three weeks or a little better.

Q. Did you ever go to any other doctor about it?

A. Yes, sir; after my arm did not get any better I went to Dr. C. E. Owens.

Q. Did you go back to work for the Seaboard any more?

A. Yes, sir.

Q. When was that?

A. After Dr. Weston turned me loose, he told me I was well, but I could not straighten it out; he told me it would get all right in a few days.

Mr. Lyles: We object.

Mr. Tompkins: Just pass that over.

Q. How long did you work for them?

A. About sixty days, or two months; I did not do any repair work.

Q. What kind of work did you do?

A. Inspecting cars.

Q. You could not use your shoulder?

A. No, sir; I could not straighten my arm at all.

Q. After that what did you do?

A. They laid me off because I would not sign a release.

Mr. Lyles: We object.

The Court: Wait a minute.

Mr. Lyles: I am perfectly willing to go into it.

The Court: Just try the case on the issues made by the pleadings.

40 Mr. Tompkins:

Q. Did you work for the Seaboard after that?

A. I stayed off something over two weeks and I went back to work for them again.

Q. How long did you work for them that time.

A. Some sixty or ninety days that time.

Q. What did you do then?

A. They laid me off again.

Q. Where did you go?
A. I did not go anywhere; I went to the Southern road to get a job and they refused to give me a job; they said I was not able to do it, that I had to use a hammer in the work, and I could not use my arm in handling a hammer back and forwards.
Q. How much were you making a month with the Seaboard when you got hurt?
A. $80.40 a month, straight time.
Q. Could you fix the amount of extra time?
A. Sometimes I would make five or six dollars a month and sometimes ten dollars a month overtime.
Q. It ran, then, from $85 to $90 a month?
A. Yes, sir.
Q. After you quit the last time and went to the Southern road and could not do the work, what did you do?
A. I went to my father's and stayed on the farm.
Q. Who is your father?
A. J. C. Lorick.
Q. This gentleman here (indicating)?
A. Yes, sir.
Q. You went back to his home?
A. Yes, sir.
Q. Where does he live?
A. At Blythewood.
Q. Did you work a farm there that year?
A. Yes, sir.
Q. Did you have any trouble with your arm in performing your work as a farmer?
A. Yes, sir.
Q. Farming is not quite as remunerative as railroad work?
A. No, sir.
Q. You have been at it ever since?
A. Yes, sir.
Q. How did you come out with your farming operations?

Mr. Lyles: We object to that; because a man is not a good farmer he can not blame the railroad for that.
41 Mr. Tompkins: I have a right to show that he was making a certain amount of money when he was hurt.
The Court: I think it is competent in that way.
Mr. Lyles: It is irrelevant.
The Court: Objection overruled.

Mr. Tompkins:

Q. Have you made anything?
A. I came out about three hundred dollars behind.
Q. How did you come out this year?
A. I have got it down to close to two hundred dollars this year.
Q. Have you had your arm examined by any doctor since then?
A. By Dr. Owens.
Q. Dr. C. E. Owens?

A. Yes, sir.

Q. Have you been able to use your arm to work with any degree of satisfaction since your injury?

A. No, sir.

Q. How is it affected?

A. If I do any work at all with it I turn blind, and my arm pains me at night and I can not rest a bit.

Q. Where is it broken?

A. In the shoulder blade, about the point of the shoulder.

Q. Can you feel it in there?

A. Yes, sir.

Q. You are not a married man?

A. Yes, sir; I am now.

Q. Have you any children?

A. No, sir.

Cross-examination by Mr. Lyles:

Q. Since this case was tried before, you have gotten married?

A. Yes, sir.

Q. How long had you been working for the Seaboard when or before this took place?

A. I do not know exactly; it was inside of five years; close to five years.

Q. About five years?

A. Yes, sir.

Q. What character of work had you been doing during that time?

A. Car inspector.

Q. You were doing the same kind of work that you were doing at the time you were injured?

A. Yes, sir.

42 Q. And before you came to the Seaboard where had you been working?

A. With the Southern.

Q. How long had you worked there?

A. Something over a year; close to two years.

Q. What kind of work did you do there?

A. I first started as a section hand and then worked up to assistant foreman and then I quit that and went to the shops.

Q. Where they do repairing to the cars?

A. I was air brake inspector.

Q. In order that the jury may understand this matter; how long before your injury had the Seaboard shops over at Cayce been opened up? I do not mean the exact date; but it had been several months?

A. Yes, sir.

Q. It had been opened up about six months?

A. I do not know whether it was six months or not; it was somewhere along there.

Q. Before that time the yards had been located on the Columbia side of the river?

A. Yes, sir.

Q. You were working in what is known as the joint interchange yards?

A. Yes, sir.

Q. That is the yard that is used jointly by the Southern, Coast Line and Seaboard?

A. Yes, sir; and the C. N. & L.

Q. If the Seaboard had a car that is due to go to the Southern road it is brought around there and delivered at the joint yard?

A. Yes, sir.

Q. And if the Southern has a car to go to the Coast Line or Seaboard, the Southern delivers it at the joint yard, and the other road takes them up?

A. Yes, sir. They do not deliver them at that yard; they deliver all the cars going to the Seaboard.

Q. That is really an interchange track between the Seaboard, C. N. & L., the Coast Line and Southern?

A. Yes, sir.

Q. You lived on the Columbia side?

A. Yes, sir.

43 Q. And you worked under Mr. F. N. Jones?

A. Yes, sir.

Q. And Mr. Jones was the chief car inspector for the Seaboard, and his headquarters had been for some months at Cayce?

A. Yes, sir.

Q. You went there in behalf of the Seaboard and inspected the cars that the other roads offered the Seaboard at that place?

A. Yes, sir.

Q. At the end of the day you made a written report?

A. Yes, sir; of what cars had been repaired.

Q. And what cars you had turned down, and such as that?

A. Yes, sir.

Q. And you made your report at night after you had finished your work?

A. Yes, sir.

Q. At that time you did not see Mr. Jones, you did not report to him at Cayce before you went to work?

A. I would see him every morning.

Q. Where would you see him?

A. At the passenger station in Columbia.

Q. You did not, of course, know what cars you were going to handle, either for the Southern or Coast Line, or what cars they would offer you, before you went to work?

A. No, sir.

Q. And no one else knew that?

A. No, sir.

Q. Of course, Mr. Jones did not know what cars were coming in there?

A. No, sir.

Q. At that time who was the inspector at the joint yard for the Coast Line?

A. They did not have any special one; they would send any of their men there.

Q. Who was working there about the time you were injured, or a day or so before that?

A. I forget the boy's name.

Q. Don't you know that W. W. Howell was the man?

A. All I know is that Mr. Howell worked for the Coast Line.

Q. He worked at that place about the time you were
44 injured?

A. He would come about once a month; Mr. Hedgepath would do that.

Q. You did not see Mr. Howell when you were injured?

A. I saw him there several times.

Q. What was Mr. R. W. Watson doing?

A. He was the inspector for the Southern.

Q. You and Mr. Watson were working at the same place?

A. Yes, sir.

Q. You would not see Mr. Jones in the course of the day after you would see him at the passenger station?

A. No, sir.

Q. You did not see him on the day in question?

A. No, sir.

Q. And, of course, neither you nor Mr. Jones knew that this Rutland car was coming into that yard that day?

A. No, sir.

Q. About how many cars did you ordinarily shop there?

A. I would run to the shop as high as fifteen cars.

Q. You have shopped as high as fifteen cars a day?

A. Yes, sir.

Q. Tell me what you mean by shopping a car?

A. Cars, bad orders, loaded cars that could not be repaired and I would tag them and send them to the repair track, where they had repair men to repair them.

Q. Where were they?

A. At Cayce.

Q. There were some you could not repair; you would send an empty car there that you could not repair?

A. Yes, sir.

Q. What would they do with them?

A. I would tag them, if they were our cars, I would tag them; if they were their cars, I would turn them back.

Q. To either the Southern or Coast Line that offered them?

A. Yes, sir.

Q. No matter what was wrong, if it was your work, and you could not do it, you would turn it back, that is the way; when the southern or Coast Line offered you a car, it was up to you
45 to see that it was all right before the Seaboard took it?

A. Yes, sir.

Q. And if it was not all right you would turn it back?

A. Yes, sir.

Q. When the Seaboard offered the Southern or the Coast Line a

car at that place, and their car inspectors turned it back, they would come to you?

A. Yes, sir.

Q. And if the repair to be made was such that you could do it yourself you would do it?

A. Yes, sir.

Q. And if the repair was such that you could not do it, you put a shop tag on it?

A. Yes, sir.

Q. Because a thing you could not do you could not do; we all know that; it made no difference in that respect what was wrong with the car?

A. No, sir.

Q. It was a question of whether you could do it or not?

A. Yes, sir.

Q. And it made no difference whether the car was loaded or empty?

A. No, sir.

Q. And the question was, you had to pass on that question yourself then and there?

A. I had orders to fix the cars.

Q. To do what you could do?

A. I had orders to fix cars in that condition.

Q. To repair the cars you could?

A. I was told to do that special work there.

Q. You have become somewhat of a lawyer yourself?

A. No, sir.

Q. And you are talking about the Federal Act and things that we did not talk about before at all; when did you first find out that there was an Act of Congress on such things?

A. They had books down there; we had them in Cayce and we could read them.

Q. You did not say anything about that before, did you?

A. I do not remember.

46 Q. And you would not see Mr. Jones and no one knew what cars were coming in there; that is correct?

A. Yes, sir.

Q. You were there to do the work that you could do?

A. Yes, sir.

Q. And the work you could not do you were to shop the cars; now, let us see a little further; the last time this case was tried was in February of last year, or this year, about seven or eight months ago?

A. Yes, sir.

Q. And your recollection then would have been a little clearer than it is now, don't you think?

A. I guess it would.

Q. If you testified in the former trial that it was as much as three weeks before the time you were hurt that you asked Mr. Jones for a jack, you would think that would be more accurate, than when you say it was one week?

A. Yes, sir.

Q. Did you testify in the former trial that it had been about three weeks before?

A. As well as I remember, I think I did.

Q. Mr. Tompkins asked you this question: "How long before you were hurt was it that he promised you the last time," and you answered, "Something like three weeks."

Mr. Tompkins: I object to counsel testifying or putting in any record except in the proper way.

The Court: Ask him whether or not he said it.

Mr. Lyles:

Q. Did you not testify on the former trial that it was something like three weeks?

A. I do not remember; somewhere close there.

Q. Now, refresh your memory and see if you do not think that that is more accurate than to say it was one week?

A. Somewhere close that.

Q. Close to three weeks?

A. Yes sir.

Q. How long had Mr. Watson been there for the Southern?

A. I do not know.

47 Q. Before you were injured?

A. He was there when they sent me to the yard the first time.

Q. He was there when they sent you there?

A. Yes, sir.

Q. And you and he had seen a good deal of each other?

A. Yes, sir; man to man.

Q. You had become pretty good friends?

A. Not any more than the other fellows.

Q. Fellows who work together; did you and Mr. Watson not have a little friendly controversy about your paying for some cigars about the 7th of May, or the 6th or the 8th of May, 1913?

A. No, sir.

Q. And did that not result in a friendly or unfriendly but a pretty vigorous wrestling match, and that Mr. Watson throwed you in that match?

A. No, sir.

Q. And hurt you somewhere?

A. No, sir.

Q. What was it that you were lifting?

A. The draw-head to couple the car.

Q. Just tell us how big a piece of a thing is this, so we can understand what it was?

A. I guess it is 5 by 5, and about that long (indicating) and has a yoke in it.

Q. Is that not a part of the coupler?

A. Yes, sir.

Q. That is a part of the coupler?

A. Yes, sir.

Q. The coupler is what sticks out at the end of the car?
A. Yes, sir.
Q. This thing had fallen down?
A. No, sir.
Q. It was lower?
A. One end was lower.
Q. This piece, you say, was about five by five?
A. Yes, sir.
Q. How far did it run back under there?
A. I can not exactly tell.
Q. About how far; was it five to eight feet?
A. It was not that long, the coupler or yoke is from 30 to 33 inches long.
Q. From two to three feet?
A. Yes, sir.
Q. That is iron or steel?
A. Yes, sir.
48 Q. Made out of iron or steel and it is heavy?
A. Yes, sir. If you pick up the whole thing.
Q. If it broke your shoulder it must have been pretty heavy?
A. I just raised the end high enough to put the carry-on under there.
Q. That is what you claim broke your shoulder?
A. Yes, sir.
Q. What is the weight of this piece of draw-head?
A. I do not know.
Q. Give the jury some idea; you say you had five years' experience there?
A. I have not had any experience in weighing couplers, and there are no weights on them.
Q. You had five years' experience?
A. Inspecting cars.
Q. And you do not want to undertake to tell the jury what it weighs; how soon after your injury did you go to see Dr. Weston?
A. They sent me the third day.
Q. The third day?
A. I think it was the second or third day that they sent me; one of those days.
Q. Which shoulder was it?
A. Left shoulder.

Mr. Tompkins:

Q. You complained to Mr. Jones several times about not having a jack?
A. Several times. A number of times.
Q. What would he say on each occasion?
A. He said he did not have any at the time but would get them.
Q. This is the Seaboard over the river here at Cayce?
A. Yes, sir.
Q. How far is Cayce from the joint yard?
A. About a mile and a half.

Q. Just across the river?
A. Yes sir.
Q. What was Mr. Jones' position?
A. To see that his men had the proper appliances.
Q. Was he a car inspector?
A. He was chief car inspector over all of us.
Q. And you worked under him?
A. Yes, sir.
49 Q. Did he come over in the joint yard and look around these cars to see that you were attending to your duties?
A. Yes, sir.
Q. He is the man that gave you instructions what to do?
A. Yes, sir.
Q. Did he tell you anything about this Safety Appliance Act and what the law required?
A. Yes, sir.

Mr. Lyles: That matter has all been gone over and we have exhibited our hands.

Mr. Tompkins: Mr. Lyles has intimated that some one has been teaching him law since the last trial, and I think I can show he knew as much before the last trial.

The Court: You can ask him about that.

Mr. Tompkins:

Q. Were you all instructed in the Safety Appliances Laws to keep within the United States statutes?
A. Yes, sir; the United States Safety Appliance man, if he should come and find a low coupler, they will fine the company for it.
Q. Now, about freight cars; counsel tried very adroitly——

Mr. Lyles: I do not think that is a proper question.

Mr. Tompkins:

Q. When a repair was necessary on a car which the Safety Appliance Act applied, that did not allow it to be moved under, you could not move it?
A. No, sir.
Q. Whether you fixed it or not?
A. No, sir.
Q. It had to stay there?
A. Yes, sir.
Q. And if a man could not fix it, what did you do then, or if you did not have enough there?
A. We had to send men there to fix it.
Q. When you told counsel you shopped cars that had repairs to be done on them that you could not fix, state whether or not you meant cars which the law allowed you to shop?

50 Mr. Lyles: That is leading the witness on the turning point in this case, and I think the jury is entitled to the witness' explanation.

Mr. Tompkins: Counsel lead him on some things.

The Court: He was cross-examining him; do not lead him.

Mr. Tompkins:

Q. Just state whether or not you could shop cars which had repairs to be made, which the Act said you must make on the spot?

Mr. Lyles: This is the same question your Honor ruled out.
The Court: Answer the question.

A. No, sir; you could not shop a safety appliance car and run it out of the yard.
Q. Under whose instructions did you do all your work?
A. Mr. Jones' instructions.

The Court: He has said that two or three times, I thought.
Mr. Tompkins: Yes, sir; but the matter seems to have gotten muddled up since I examined him the last time; counsel has been trying to get something in there that I do not think is proper.
Mr. Lyles: I think it was proper.

Mr. Tompkins:

Q. Counsel asked you about having a scuffle with Mr. Watson and hurting your arm; he did not ask you about that the last time this case was tried?
A. No, sir.
Q. It was falling off a horse then?
A. That is what he said.
Q. He asked you then about a horse running away and hurting your arm?
A. Yes, sir.
Q. But he did not say anything about your scuffle with Mr. Watson on that occasion?
A. No, sir.
Q. I failed to ask you in chief; did that arm give you any pain from the time it was hurt until now?
A. Yes, sir.
51 Q. Did you ever have to stop work on account of it?
A. Yes, sir.

Mr. Lyles:

Q. If you could not fix a car you could not fix it, could you?
A. I could fix the safety appliance cars.
Q. If you were not physically strong enough to fix a car that was broken, you could not fix it, could you?
A. No, sir.
Q. It did not make any difference whether it was a safety appliance or anything else, did it? You could not fix it if you were not physically strong enough to fix it?
A. No, sir.
Q. If it was a safety appliance and you could not fix it, what did you do? You did not fix it?
A. I did not have any at that time.

Q. If you saw one that you could not fix, what did you do? You could not fix it, could you?

A. No, sir.

Q. You have testified that Mr. Jones was not over there at the time you were hurt?

A. Yes, sir.

Q. And you were there alone?

A. Yes, sir.

Q. You do not want to change that, do you?

A. No, sir.

Q. You are satisfied of that?

A. Yes, sir.

Q. How do you expect to tell the jury whether you could fix a safety appliance or anything else yourself?

A. I had instructions to fix them.

Q. You had to fix what you could?

A. I had instructions to fix cars with low couplers, and not let any come back.

Q. And if you could not fix them you were to send for help?

A. He said if I could not fix them, he would put a man there that would fix them.

Q. You were expected to fix things that you could not fix?

A. No, sir.

Q. They did not think you were supernatural; Mr. Jones thought you were supernatural?

A. He just told me to fix those special cars.

Q. Do you mean to say, as a proposition of law—and you seem to have learned a good deal of law recently, since the last trial—
52 do you mean to say here that the Safety Appliance Act of Congress as they knew of it?

A. I guess so.

Q. That the Safety Appliance Act of Congress did not allow you to shop a car with a defective coupler?

A. No, sir.

Mr. Tompkins:

Q. Counsel has again, after your Honor refused to let us have his explanation of how he knew this law——

The Court: Ask him to explain it.

Q. How did you find out what you knew about this Safety Appliance law; where and when did you get the information?

A. Mr. Jones would instruct us and caution us not to take a car from another road; if I had taken the car from any other road, I would not have had any more job than a rabbit when night came; he would have run me off; I had to do what he said.

Q. Did he explain that law to you?

A. Yes, sir.

Q. You knew at the last trial all you know now?

A. Yes, sir.

Q. Have I taught you any law since that?
A. No, sir.

S. G. ELDERS, sworn.

Direct examination by Mr. Tompkins:

Q. Where do you work?
A. At the Union Station in Columbia.
Q. What kind of work?
A. Firing the stationary boiler.
Q. In the day time or night time?
A. Night time.
Q. Were you ever present with Mr. J. H. Lorick when he asked for a jack to use in raising couplers at the joint yard from Mr. F. N. Jones?

Mr. Lyles: We object to the form of the question, first, because it is leading; second, we object until he locates the time and connects it with this accident.
The Court: It would be within a reasonable time.

53 Mr. Tompkins:

Q. Do you recall the time that Mr. Lorick was hurt?
A. I was not called.

The Court: Do you recall the time?
A. I do not remember the time he was hurt; I saw him when he was hurt.

Mr. Tompkins:

Q. Do you know when he quit work there?
A. Yes, sir.
Q. Previous to that time had you heard any conversation between him and Mr. F. N. Jones about the work?
A. I did before I left there.
Q. About how long before that was it?
A. I do not remember right now; I remember about how long it was.

The Court: Give us your idea on it.

Mr. Tompkins:

Q. What conversation did you hear between Mr. Lorick and F. N. Jones?

The Court: This is objected to, and the objection is proper at this time; about how long was it before this man was said to have been injured; I don't suppose you looked at the clock, but give us your best judgment. Was it one year or two months?

A. It was something inside of one year.

Mr. Tompkins:

Q. It was not as long as one year?

A. I do not think it was.

Q. The testimony of the plaintiff was that it was on several different occasions that he had asked for the jack.

The Court: Yes, sir.

Mr. Tompkins: And this might have been one of the occasions.

The Court: How long would you say it was? What is your best judgment?

A. I do not remember.

Q. You have no judgment on it?

A. It was inside of one year, I know.

54 Q. Was it inside of six months?

A. I can not say that; it was inside of one year, I know.

Mr. Tompkins: I do not think the law requires that this conversation should be at any particular time.

The Court: Ask the question and let the objection be made.

Mr. Lyles: We object, because the testimony is irrelevant, not being connected reasonably in point of time, there being no question of wilfulness or wantonness in this case.

The Court: I think one year is too long; I am going to rule it out.

Mr. Tompkins: He does not say it was one year.

The Court: I know what he said; he said he did not think it was within six months, but was within one year.

Mr. Tompkins:

Q. But he could not say it was less than six months; he can not swear it was three weeks before.

The Court: I am going to allow the question; go on.

Mr. Tompkins:

Q. What conversation did you hear between Mr. Lorick and Mr. Jones about that jack?

A. I heard Mr. Lorick ask him for a jack to take to the joint yard, and he told him he did not have any jacks.

Cross-examination by Mr. Lyles:

Q. Where do you work now?

A. At the Union Station.

Q. You used to work for Mr. Jones?

A. Yes, sir.

Q. And Mr. Jones discharged you?

A. Yes, sir.

Q. And you stated at the last trial that Mr. Jones had fired you, and that you had it in for him, and you still had it in for him?

A. Yes, sir; I said so.

Q. Is that correct?

A. Yes, sir.

Q. And you have testified in a good many cases growing out of

accidents in the yard; you have testified in a good many of
55 these cases arising out of cases in the Columbia yards?
A. Not only when they have summoned me.
Q. You have been there ?
A. I had to go when they summoned me.
Q. You have been in five or six?
A. No, sir.
Q. You were in Camden?
A. Yes, sir.
Q. And two in Columbia?
A. One in Columbia.
Q. How many here?
A. This is all.
Q. And you made the statement that you had it in for Mr. Jones because he fired you?
A. Yes, sir; that is what I said.
Q. As a matter of fact, did you not leave the Seaboard in January, 1912?
A. I do not remember what time it was.
Q. About the first part of the year 1912; was it not during the month of January?
A. I do not remember.
Q. About the first part of the year 1912, was it not during the month of January?
A. I do not remember.
Q. You are not certain when you heard this conversation; do you know when Mr. Lorick was hurt of your own knowledge?
A. I do not remember the date.
Q. Do you remember the month?
A. No, sir.
Q. Do you remember the year?
A. Only I just saw him going with his arm in a sling.
Q. You do not know how long that was after he claimed to have been hurt?
A. He was hurt after I left there.
Q. That is all you can say; that it was within one year?
A. Yes, sir; it was before I left there and inside of one year.
Q. You would not swear it was inside of ten months?
A. I can say it was inside of one year is the best I can do.
Q. Now, may it please the Court: We make a motion to strike this testimony from the record on the ground that, on cross-examination, it is shown to be too remote in point of time, and could have no relevancy except in the question of wilfulness.

The Court: The motion is refused.

56 Mr. Tompkins:

Q. You say you have it in for Mr. Jones; you have no feeling against the Seaboard?
A. Certainly, not a bit; I work for the railroad company and I

have no feeling against the railroad company; I have been working for them all my life.

Q. You know that if Mr. Lorick gets a judgment against the road Jones will have nothing to pay?

A. He did not treat me right and I never will like him.

Q. Will that affect your testimony in this case?

A. Not a bit in the world.

Mr. Lyles:

Q. You know that Mr. Jones is the man that is charged with having failed to furnish these jacks; you know that Mr. Jones is the man that is charged with having failed to having furnished these jacks?

A. Yes, sir; he is supposed to furnish them; I know that.

Q. And if any one is at fault he is at fault?

A. He is the one that is supposed to furnish the jacks.

Q. You know if any one is at fault he is at fault?

A. Yes, sir; he could have given him the jacks.

F. B. GREEN, sworn.

Direct examination by Mr. Tompkins:

Q. What position do you hold in the joint yards?

A. Joint yardmaster for the Southern, Seaboard and Coast Line in Columbia.

Q. Were you employed there on the 7th of May, 1913?

A. Yes, sir.

Q. Were there any jacks there for the use of the employees of the Seaboard at that time?

A. I could not say.

Q. Did you see any?

A. No, sir.

57 Cross-examination by Mr. Lyles:

Q. You do not know whether Mr. Lorick had a jack on the 7th of May, 1913, on his work?

A. No, sir.

Q. Do you know whether he did or not?

A. I do not know anything about it; I did not look after his tools; I do not know whether he had a hammer or a cold chisel.

Defendant's Testimony.

F. N. JONES, sworn.

Direct examination by Mr. Lyles.

Q. What are you doing now?

A. Wrecking foreman for the Seaboard.

Q. In 1913, May 7, what were you doing?

A. I was chief car inspector.

Q. Chief car inspector for what?
A. For the Seaboard.
Q. At what point were you located?
A. Cayce and Columbia.
Q. Just tell us what was the situation of the yards at Cayce with reference to what they call the joint interchange yards, and the yards at Cayce; tell us about the two yards?
A. The general switching yard was at Cayce, and the interchange yard was one mile north of Cayce, close to the Olympia Mills, between the Coast Line, Southern and Seaboard, where they interchanged cars.
Q. Does the Congaree river separate the Cayce yards from the interchange yards near the Olympia Mills on the Richland side?
A. Yes, sir.
Q. The Seaboard crosses the Congaree river on a trestle?
A. Yes, sir.
Q. In May, 1913, at the time Mr. Lorick claims to have been injured, what position did he hold?
A. He was the inspector at the interchange yard for the Seaboard.
Q. At the interchange yards?
A. Yes, sir.
58 Q. Tell us, in the first place, as to the movement of cars into that interchange yards, what railroads ran cars in there?
A. Seaboard, Southern and Coast Line.
Q. What did the inspector- do in that yard?
A. They inspected those cars.
Q. Tell us how the Seaboard cars would get into that yard and where they would get them?
A. The Seaboard would send those cars down for their other connections.
Q. For the Southern and Coast Line?
A. Yes, sir.
Q. Who would inspect the cars the Seaboard brought in and offered to the other roads?
A. The Southern had an inspector there, and the Coast Line had an inspector there.
Q. State whether or not they inspected the cars to see whether they were in proper condition to be accepted by the other roads?
A. Yes, sir.
Q. Suppose that either the Southern or Coast Line refused to accept a car, because it was not in proper condition, what did they do with it?
A. If it was so it could be repaired, and they did not have time to do it, or anything, or on account of its condition they could not repair it, they would put a shop tag on it and send it to the shop.
Q. Who did that?
A. The Seaboard inspector.
Q. If a Seaboard car was turned back whose duty was it to do that in 1913?
A. Mr. Lorick's.

Q. What instructions had you given him; what sort of repairs was he to do on those cars in that yard?

A. All repairs he could possibly do to get the cars out.

Q. To have them accepted by the other roads?

A. Yes, sir.

Q. Do you say that Mr. Lorick had to report to you before going to work in the interchange yards in the mornings?

A. Not always.

Q. When you saw him where would you see him?

A. Sometimes he would come to Cayce and sometimes I would go over there.

59 Q. On the day that he claims to have been injured, May 7, 1913, had you seen him before he went to work that morning?

A. No, sir; not that day.

Q. At the time he claims to have been injured where were you located?

A. At Cayce.

Q. Had you any means of knowing what cars would be carried into that yard by the Seaboard?

A. No, sir.

Q. Did you have any means of knowing what cars Mr. Lorick would be called upon to work on that day?

A. No, sir.

Q. Did he have any means of knowing what cars were coming in for him to work on before they got there?

A. He did not.

Q. As to the character of the repairs that Mr. Lorick was undertaking there, tell us what repairs he was to make?

A. All the repairs he possibly could make.

Q. If he could not make the repairs what was to be done with the cars?

A. Put a shop tag on it and send it back to the shop track.

Q. Explain what you mean by putting a shop tag on it?

A. If a car is not in running condition that another road will not accept, with certain defects, and the man at that time can not make the repairs, he puts a shop tag on the side of the car and sends it back to the shop track.

Q. Who takes the car back to the shop track?

A. The switch engine.

Q. The car that Mr. Lorick put a shop tag on, did he have anything to do with hauling that car back to the shop track?

A. No, sir.

Q. Did he have anything to do with coupling that car to the switch engine when they came there to take it back?

A. No, sir; he might instruct the train crew as to what cars were going back and where the cars were located.

Q. Would he take any actual part in coupling it to the switch engine?

A. No, sir.

60 Q. Did the switch engine carry its own crew?

A. I am not instructed to see, but I expect they did.

Q. State whether or not it was the business of the switch engine and its crew to couple up the cars that were going back to the shop?

A. Yes, sir.

Q. Had you made any difference in your instructions to Mr. Lorick as to the cars he was to repair there, between the cars that were defective under the Safety Appliance Act of Congress and cars that were defective in any other manner?

A. No, sir; I told him to make all such repairs as he could possibly make.

Q. Were you there on this occasion?

A. No, sir.

Q. When this car was placed there for Mr. Lorick to make the repairs?

A. No, sir.

Q. What means did he have of knowing what repairs or of determining what repairs he would or would not make?

A. Only from his own judgment and the time he had to work in.

Q. In this instance, where Mr. Lorick claims the drawhead of the car was too low and he attempted to raise it with his shoulder, would there have been any criticism or censure upon him if he had shopped that car?

Mr. Tompkins: I do not think he has any right to testify what they might have done under different circumstances.

The Court: I really was not following the question.

Mr. Lyles: The question was this: that if Mr. Lorick had exercised his judgment in this case on this car that had a defective coupler, to have shopped that car, would there have been any criticism or stricture from Mr. Jones, his superior, because he had shopped that car.

The Court: That is another way of asking what the rule was.

Mr. Lyles: Mr. Lorick has undertaken to say that he would have lost his job if he did not fix that car at that point.

61 The Court: It is in reply to that; he said if he had not done it some one else would; your man said if he had not done it some one else would have done it for him and he would have been discharged; now, Mr. Lyles has the right to direct his testimony to that particular point.

Mr. Tompkins: All of that is governed by statute and there is a Supreme Court decision which holds that the fixing of a low coupler must be done on the spot; that is the law.

Mr. Lyles: I most respectfully beg to differ with counsel.

The Court: Go on and ask your question.

Mr. Lyles:

Q. If Mr. Lorick, in the case of this particular car, had exercised his judgment to shop that car instead of undertaking to fix it there, as he says, without jacks, would there have been any stricture or criticism from you as his superior officer because he shopped the car.

Mr. Timmerman: We object on the further ground that a general

rule can not be proved by specific acts; the question to which your Honor directed your attention was this: The statement made by the plaintiff on the stand to this witness, if he could not do this work that he would have put a man there to it; that is a specific statement, and it is susceptible of specific allegations; they can not prove a rule by coming in here and having this witness say what he could have done with this particular car in this particular instance. There are various things he might or might not have done.

The Court: I think the question would have been better to ask would he have violated any law?

Mr. Timmerman: He is stating the rule.

The Court: That is an indirect way; not what he would have done, but would this plaintiff have violated any rule from him.

Mr. Timmerman: Our position is that they must prove the rule.

The Court: Note the exception.

62 Mr. Lyles:

Q. Now, listen to the question: If, on this particular occasion of this Rutland car, if Mr. Lorick had exercised his judgment and shopped the car, instead of undertaking to repair it on the spot, without jacks, would he thereby have violated any rule or instructions from you concerning that work?

A. No, sir; there would have been no criticism.

The Court: He asked you about a rule, the particular rule, not criticism, because that is what you might or might not have done, according to your own imagination or caprice on your own part; the question is, would he have violated any rule or instruction from you?

A. No, sir.

Mr. Lyles:

Q. State whether or not you told Mr. Lorick before this occasion, or on this occasion, that if he could not do the work like that there, that you would get some one else that could?

Mr. Tompkins: Counsel asked the question if he told Mr. Lorick that if he did not fix these cars, that he would get a man there that could; Mr. Lorick did not say that; what Mr. Lorick said was that if he did not fix that they would put a man there.

The Court: He said they told him, or they would have done it one.

Mr. Tompkins: If he did not fix the cars he would put a man there who would.

The Court: He refers to him.

Mr. Tompkins: He does not say him, but would have done it.

The Court: I do not see any great difference.

Mr. Lyles:

Q. If Mr. Lorick had not done the work on this car, but, instead, had shopped the car, would you have put a man in his place to do it?

A. No, sir.

Q. Before the time of this injury did you ever have any discussion with Mr. Lorick about furnishing him with jacks?

63 A. It was some time before we moved to Cayce, or, rather, before we moved from the Park. I think he asked me to get him a track jack what the track people use.

Q. That was before you moved from Columbia?

A. Yes, sir.

Q. When did you move from Columbia to Cayce?

A. January 1, 1913.

Q. About five months before this occurrence?

A. Yes, sir.

Q. You were then located in the Columbia yards?

A. Yes, sir.

Q. You and Mr. Lorick, too?

A. Yes, sir.

Q. What did Mr. Lorick ask you on that occasion?

A. He asked me for a track jack, a light one; he could not use the switch jack, that he did not want to have a heavy jack, and I told him I had two, to take one; I was boarding right close to the yard and he asked me the same question after he came back to work after he was injured, and that was after we moved to Cayce.

Q. That would not be relevant; outside of that occasion, some time before January 1, 1913, when he asked you for this light jack, did he make any other requests for jacks to you whatever?

A. No, sir.

Q. Did you have, during this time, after you moved to Cayce and before his injury, did you have jacks on hand at your place?

A. Yes, sir.

Q. That was Mr. Lorick's headquarters?

A. Yes, sir.

Q. He was working under you?

A. Yes, sir.

Q. Did you have a jack there that Mr. Lorick could have gotten?

A. The track jack he asked for and I told him he could get it.

Q. That was in Columbia?

A. Yes, sir.

Q. After you moved to Cayce did you have a track jack that he could have gotten?

A. Yes, sir.

Q. Had you had an assistant to this inspector at the interchange yard?

A. Never have, except when I first took the job; that was

64 the first job I held with the Seaboard in 1907, and I had an assistant at that time, it was blocked all over the system, and after that rush was over the assistant was taken off and there never has been one since.

Q. Did you ever give Mr. Lorick any instructions to the effect that he should undertake, or that his duties required him to undertake, any work that he could not do with safety to himself?

A. No, sir.

Q. How much experience have you had in the service as a car inspector?

A. About 23 or 24 or 25 years.

Q. What was the weight of that coupler that Mr. Lorick undertook to lift?

A. There are some couplers that will vary their weight; if it was a large 5 by 7 shank, it would possibly weigh 350 or 400 pounds, and if it was a 5 by 5 it would weigh 275 or 300 pounds.

Q. Would the weights run from 275 to 400 pounds?

A. Yes, sir; that includes the yoke and knuckle.

Q. Is there anything hid about that coupler as to the size and weight of it?

A. No, sir.

Q. Could a man with two good eyes tell how big it was?

A. Yes, sir. If he has had experience.

Q. What is this?

A. A time book.

Q. Did you keep that?

A. Yes, sir.

Q. Now look at that and tell us——

Mr. Tompkins: Did you keep it?

A. Yes, sir.

Q. Is that your writing?

A. Yes, sir.

Mr. Lyles:

Q. Did you keep Mr. Lorick's time?

A. Yes, sir.

Q. What period does it cover?

A. 1910 to 1913.

Q. Until the time he quit?

A. Yes, sir.

Q. Look at that time book and tell us how much Mr. Lorick made?

A. In December, 1910, when he first began, he was paid as a car inspector's helper, $52.

Mr. Tompkins: That is not relevant to the issue; we have proved what he was making at the time he was hurt; he can not
65 go back three years and prove what he was making at that time.

Mr. Lyles: I just wanted to find out what he was making.

The Court: It would be within a reasonable time of the accident.

Mr. Lyles: How much was he making at the time he was injured?

A. $80.40 a month.

Q. Did you pay him by the hour?

A. No, sir; by the month of twelve hours a day.

Q. He was carried on that book as a car inspector?

A. Yes, sir.

Q. During that time was he doing work of a similar character as when he was an inspector's helper?
A. Yes, sir.

Cross-examination by Mr. Tompkins:

Q. You received instructions from your superior officers with regard to the Safety Appliance Act as to where and how to make repairs based on that Act?
A. Yes, sir.
Q. Have you got it with you?
A. No, sir.
Q. Why did you not bring them?
A. I was not asked to bring them.
Q. Do you mean to tell the jury that your instructions said that in repairing a low coupler that the car could be moved for the repairing of the low coupler, and that it did not have to be made on the spot where it was discovered?
A. No, sir; it did not have to be made on the spot where it was discovered.
Q. You are still doing that?
A. Yes, sir.
Q. You haul low couplers off from where they are discovered to the shop?
A. They are taken out of the train and put in the rip track.
Q. You would know that Act if you heard it read?

Mr. Lyles: It is not competent to cross-examine a witness as to an Act of Congress; it is a question of what instructions he
66 received, and as to whether he violated the law is a question for your Honor.

The Court. I will let him answer the question.

Mr. Tompkins:

Q. You would know that law?
A. I am only going by the instructions I had, and from the Interstate Commerce Commission.
Q. You had a copy of that Act?
A. I do not know that I ever read a copy of the law.

The Court: He did not ask you that.

A. I only heard what was termed defective.

Mr. Tompkins:

Q. This says: "That any common carrier subject to this Act, using, hauling, or permitting to be used or hauled on its line any car subject to the requirements of this Act, not equipped as provided in this Act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered as provided in section six of the Act of March 2, 1893, as amended April 1, 1896: Provided, That where any car shall have been properly equipped, as

provided in this Act, and the other Acts mentioned herein, and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired, without liability for the penalties imposed by section four of this Act, or section six of the Act of March 2, 1893, as amended by the Acts of April 1, 1896, if such movement is necessary to make such repairs, and such repairs can not be made except at such repair point." Did you have instructions as to that?

A. My instructions were, if the train come to shop this car, and simply send it to the rip track and not repair them in the yard.

67 Q. Did your instructions read if the repairs could be made at the point of discovery they must be made there?

A. There was always switching in the yard.

The Court: Was that your instructions?

Mr. Tompkins:

Q. Did your instructions read that such repairs must be made at the point where they were first discovered if they could be made at that point?

Mr. Lyles: We object to that; there was no notice to produce any such instructions, and, furthermore, it is irrelevant to this case as to the instructions he received. The question, under the allegations of the complaint, is as to the instructions he transmitted. I further object on the ground that it is not competent to cross-examine a witness as to the provisions of the law; that is a question for the Court.

The Court: Note the objection; go on; objection overruled.

Mr. Tompkins:

Q. Go on?

A. If it could be repaired when discovered, if not it was switched to the rip track where the repair man was.

Q. You mean to say the raising of a coupler can not be done at the point where it is discovered?

A. Not always.

Q. You differ with the United States Supreme Court on that?

Mr. Lyles: We object to that on the ground that it is not competent to cross-examine a witness on the decisions of the United States Supreme Court.

The Court: The objection is overruled; go on.

Mr. Tompkins:

Q. The decision of the United States Supreme Court, in the case of the United States, plaintiff in error, vs. Erie Railroad Company, in the United States Supreme Court reports, October term, 1914,

68 says: The original Safety Appliance Act is entitled "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving wheel brakes and for other purposes." The first section makes it unlawful, among other things, for a railroad company engaged in interstate commerce to run any train in such commerce without having a sufficient number of cars so equipped with train air brakes, commonly spoken of as air brakes, that the engineer on the locomotive can control the speed of the train——

The Court: I did not know you were going to read the whole thing; I thought you wanted to ask it in order to form a question.

Mr. Tompkins: I am getting down to that. The hauling of the cars with defective equipment was clearly in contravention of the statute. While section four of the Act of 1910 permits such cars to be hauled, without liability for the statutory penalty, from the place where the defects are discovered to the nearest available point for making repairs, it distinctly excludes from this permission all cars which can be repaired at the place where they are found to be defective, and also declares that nothing therein shall be construed to permit the hauling of defective cars by means of chains instead of draw-bars in association with other cars in commercial use, unless the defective cars contain live stock or perishable freight. Six of the cars that were hauled while their equipment was defective could have been readily repaired at the place where the defects were discovered, which was before the hauling began. The remaining two were hauled by means of chains instead of draw-bars in association with other cars in commercial use, and it is not claimed that they contained live stock or perishable freight. Were you not instructed that the raising of the coupler and the repairing of the draw-bars was a repair which must be made on the spot where it was found?

69 The Court: This is objected to and the objection is overruled.

Mr. Tompkins: Answer it?

A. No, sir.

Q. You were not?

A. No, sir.

Q. You did not instruct Mr. Lorick to raise that draw-head right in the yard where he found it?

A. To raise it there?

Q. Yes?

A. To do all the work he could possibly do and what he could not do to send it to the rip track.

Q. He raised that one?

A. I do not know.

Q. The Southern Railroad took it?

A. I guess so.

Q. And you did not help raise draw-heads or low couplers without the use of a jack?
A. Yes, sir.
Q. You have done it?
A. Yes, sir.
Q. Did you put your shoulder under there and prize it up?
A. No, sir.
Q. How did you do it?
A. I had the nuts taken off the carry-on iron or arm and put an iron under it.
Q. How would you lift the iron?
A. All you have to do is to take the nuts off and let the iron down and get the draw-arm uncoupled.
Q. How would you raise it?
A. The nuts will pull the coupler back as far as it will go.
Q. How would you get the nuts in there?
A. You would have to take them off; you have to slack and let the carry-on iron down enough to slip the other iron underneath it.
Q. It is far less expensive for the railroad to make minor repairs right where they occur?

Mr. Lyles: It is a question of Mr. Lorick's instructions.
The Court: Note the objection; the objection is overruled: ask the question.

A. It is less expense?
Q. Yes?
A. Yes, sir, it is less expensive; they might have to switch the car and pay a per diem on it.

70 Mr. Tompkins:

Q. Now, in raising that draw-head, it would not apply if there were no nuts on it, if they were rusted off; the way you would raise a coupler would not apply if the nuts were rusted off?
A. No, sir; the coupler would be away down and liable to drop off if the nuts were off.
Q. You swear that was the only time he asked you for that jack was before you moved to Cayce and after the man was hurt?
A. Yes, sir.
Q. Was the only time he asked for a track jack?
A. Yes, sir.
Q. Did he ever ask you for any other kind of a jack?
A. No, sir.
Q. You do not mean to say it would not have been better to have had a jack to raise it?
A. A jack would have possibly worked better there; I do not know about that.
Q. Mr. Lorick had to go to work at seven o'clock in the morning?
A. I think it was from seven in the morning until seven at night; I think there were times when he went to work at eight and worked until eight.

Q. There was no necessity for him to come to the yard every morning before he started to work?

A. I think there was a while the inspectors at the interchange yards had to go to the passenger station and work the passenger trains.

Q. He was allowed to make extra time?

A. When it was made it was given to him.

Q. Mr. Lorick testified that he made from five to ten dollars a month extra time?

A. I do not think it would run that much; the time book is here from 1910 to 1913 and it gives it.

Q. What do you think it would run?

A. Maybe it would be three hours a week, or something like that.

Q. Where are your track jacks kept there?

A. The section men keep the main jacks on the sections.

71 Q. What were you doing with it?

A. I had ordinary light jacks to do light work.

Q. What were you doing?

A. We used them there for light work, like jacking up a drawhead; the company furnished a heavier jack for the repair men.

Q. And that is all you had to do with the jacks you had, was just such work as Mr. Lorick was doing?

A. No, sir; we had to put wheels under the railroad cars and take the trucks out.

Q. Did the car inspectors or car repairers do that?

A. The car inspectors.

Q. You were a car inspector?

A. Yes, sir.

Q. You are talking about what the car inspectors had to do; what did your office have to do with jacks except what Mr. Lorick wanted with it?

A. To do work with.

Q. What did you want with them?

A. To do work with.

Q. But you did not give him one?

A. They were on the rip track; we always used two on the rip track for light work.

Q. I believe you said when you went there you began on the same job Mr. Lorick did?

A. Yes, sir.

Q. And you had some one to assist you?

A. The yard got so blocked in the park yard that they did not have enough to supply the facilities there, and they furnished a man to help me get the cars out.

Mr. Lyles: I wish you would explain to the jury a little more definitely; you say on one or more occasions you assisted Mr. Lorick in raising a coupler without using the jacks; did you undertake to raise it with your shoulder?

A. I do not remember saying I assisted Mr. Lorick; I said I assisted several; it might have been Mr. Lorick.

Q. Did you ever undertake to raise it with your shoulder?
A. No, sir.
Q. Have you ever done it?
A. No, sir; you have no room to get under there.
72 Q. Would the danger be obvious?

Mr. Tompkins: That is not competent.
The Court: Answer the question; objection overruled.

Mr. Lyles:

Q. Would the danger be obvious?
A. Yes, sir; if he was a mind to strain himself or hurt himself.
Q. What position would he have to get in?
A. He would have to get down in a shape like that (indicating); the coupler is only about thirty inches from the top of the rail, and he would have to get down in a position like that on his all fours.
Q. How much do you say that coupler would weigh?
A. Possibly two or three hundred pounds.

The Court: He has already answered that.

Q. What was it made of, iron?
A. Yes, sir, and steel.

Mr. Tompkins:

Q. Is not the distance 32½ inches?
A. It is 31½ inches for a freight car.
Q. You said 30 inches?
A. I said 30 inches if it was too low.
Q. A man could not get under the rail?
A. It is 4 inches high.
Q. That would put it 36 inches?
A. If the coupler was low, it would be lower than 31½ inches.

J. H. LORICK, recalled in reply.

Direct examination by Mr. Timmerman:

Q. You heard what Mr. Entzminger said about your hauling fertilizer from Blythewood?

Mr. Lyles: That is not in reply; this man has already testified to his alleged incapacity.
Mr. Timmerman: Those are specific acts.
Mr. Lyles: He has already testified as to his incapacity following the injury. and these other people have testified to his capacity.
73 The Court: I think it is clearly in reply.

Mr. Timmerman:

Q. You heard what he said about your hauling fertilizers from Blythewood; did you do that?
A. No, sir.
Q. Who hauled it?
A. My two brothers.

Q. What about your getting wood?

A. I have a sister in Columbia and I have a brother with the Seaboard, and I brought them a little chopped up stove wood on a one-horse wagon and carried it down to them when I was coming to Columbia; I did not sell any wood at all.

Q. One witness went on the stand and said you got in a wrestling match with Mr. Watson and that he threw you down on your shoulder and you complained about it, and were complaining the next day that Mr. Watson had hurt your shoulder, is that true?

A. No, sir.

Q. Did Mr. Watson ever hurt your shoulder?

A. No, sir.

Q. Did you ever have anything to do with Mr. Watson except a friendly tussle?

A. No, sir.

Q. Did you ever get mad and fight?

A. No, sir.

Q. Do you remember shortly after you were hurt when you were around there did any one accuse you of this thing?

A. No, sir.

Mr. Lyles: We object to that.

Mr. Timmerman: I will not press it.

Q. How about your plowing?

A. I did not do any plowing except we had a crop pitched, and I had not done any work to amount to anything; my father had pitched the farm and planted the cotton with a cotton planter; every now and then I would go to the field and plow when he was off, I would do some of it.

Q. Did you ever do heavy, hard work?

A. No, sir.

Q. Were you able to do it?

A. No, sir.

Q. Tell us about that wild horse?

A. I have not seen it.

Q. What kind of a horse was that?

A. It was a horse of some spirits, but I never knew it to run away.

74 Q. Would your sister drive that horse?

A. Yes, sir; she drove it to school; she is 14 years old.

Q. Did she have any trouble in managing it?

A. Not a bit in the world.

Q. How old are you?

A. I will be twenty-six the 19th of November coming.

The Court: I understood your father to say you were 23; was he thinking about your other brother?

A. I suppose so.

No cross-examination.

Motion for Direction of Verdict.

Upon the conclusion of the testimony, the defendant requested the direction of a verdict in its favor upon the following grounds, duly stated and taken down by the stenographer:

1. That there is no evidence tending to show any negligence on the part of the defendant, within the allegations of the complaint, having a casual connection with the injuries of which plaintiff complains, within the provisions of the Federal Employers' Liability Act.

2. That the only reasonable inference to be drawn from the testimony is that plaintiff assumed the risks and dangers in attempting to lift the coupler with his shoulder, within the meaning of the Federal Employers' Liability Act.

The motion was refused by his Honor in a formal order.

Charge.

No exceptions are predicated upon the charge of the Court, and the same is omitted.

75 *Notice of Appeal.*

Judgment was duly entered on the verdict in favor of plaintiff for $1,500.00 and costs, and, thereafter, within ten days from the rising of the Court, due and proper notice of intention to appeal to the Supreme Court was duly served, and, thereafter, the time having been extended by agreement, this case was duly served and agreed to, together with the following

Exceptions.

Please take notice that, on the appeal to the Supreme Court, the defendant will rely upon the following exceptions:

I. That his Honor erred in refusing to direct a verdict in favor of the defendant, as requested, in the first ground of its motion, as follows, to-wit:

"(1). That there is no evidence tending to show any negligence on the part of the defendant, within the allegations of the complaint, having a casual connection with the injuries of which plaintiff complains, within the provisions of the Federal Employers' Liability Act."

II. That his Honor erred in refusing to direct a verdict in favor of the defendant, as requested in the second ground of its motion, as follows, to wit:

"(2). That the only reasonable inference to be drawn from the testimony, is that plaintiff assumed the risks and dangers in attempting to lift the coupler with his shoulder, within the meaning of the Federal Employers' Liability Act."

76 *Stipulation.*

It is agreed that the foregoing shall constitute the record for the hearing of this appeal in the Supreme Court and shall constitute the case and return, and no other or further return need be filed, either in the Supreme or Circuit Courts.

FRANK G. TOMPKINS,
Attorney for Plaintiff.
J. B. S. LYLES,
Attorney for Defendant.

77 THE STATE OF SOUTH CAROLINA:

In the Supreme Court, Eleventh Circuit, Lexington County, April Term, 1916.

No. 38.

J. H. LORICK, Plaintiff-Respondent,
against
SEABOARD AIR LINE RAILWAY, Defendant-Appellant.

Opinion by R. C. Watts, A. J.

This is the second appeal in this case. The case is reported in 102 S. C., 275.

At the trial of the case the first time a motion was made and granted by the Circuit Court on the ground the Defendant had assumed the risk, an appeal was taken and the case reversed by this Court. On the second trial in the Circuit Court a motion was made for a directed verdict by the Defendant on the ground that the plaintiff had assumed the risk and that no other inference could be drawn from the evidence in the case and that there was no evidence of negligence having a proximate casual connection with the Plaintiff's injuries.

The motion for a directed verdict was overruled and the case submitted to the jury and resulted in a verdict for the Plaintiff for $1,500.

After entry of judgment Defendant appeals and complains of error on the part of his Honor in not directing a verdict in favor of the Defendant upon the grounds made in the Circuit Court.

As to the ground that the Plaintiff had assumed the risk. The evidence in the case now is practically identical in substance with that of the former appeal, if different at all only in some slight respects and not in substance the Court decided then contrary to the contention of the Defendant and would not be warranted in now making a different decision on the point involved without
78 stulifying itself or overruling its former decisions.

It is difficult to understand why the Appellant could conceive that the Court would recede from its former decisions on

this point in the same case or where the Appellant gets the idea that this Court wishes to overrule that decision.

This Exception is overruled.

The other question in the case is based on the allegation that there was no evidence of negligence in the case on the part of the Defendant that had a proximate causal connection with Plaintiff's injuries. This point was not made or adjudicated in the former appeal, although it could have been made then as well as now as the evidence in this case is practically the same as in the first case and the defendant overlooked or did not think of it then and the Defendant is within his rights in making it for the first time in the trial the second time in the Circuit Court.

The Plaintiff alleged in his Complaint that the Defendant was negligent in failing to furnish the Plaintiff with a jack for the purpose of raising defective couplers which was the proper, safe and suitable way of doing the work, which he was doing at the time he was injured, although they had promised to do so and failed to do so, and that he was required to do the work without the aid of this safe and suitable instrumentality and that in doing so he was injured. The Plaintiff supported this allegation by his own evidence and other witnesses introduced in his behalf, this issue was disputed and controverted by witnesses, introduced by the Defendant, this made an issue of fact if the Plaintiff's evidence was to be believed the jury would find in his behalf, and if they believed the Defendant's witnesses their finding would be different.

There was ample evidence to go to the jury for them to determine whether the Defendant had promised to furnish the jack and whether the Defendant was negligent in failing to do so, and whether or not the Plaintiff was coerced and induced to do the work without the aid of such suitable tools under the threat of the representative of the master to discharge him unless he did perform the work. It was for the jury to determine whether the Plaintiff was required by his superior to make the repairs on the spot.

79 It is the law of the Federal Statute that such repairs must be made on the spot and cannot be hauled to the most available point unless "such movement is necessary to make such repairs and such repairs cannot be made except at such repair point" in sec. 4, Federal Safety Appliance Act of 1893, as amended in 1903 and 1910, this Section has been construed by U. S. Supreme Court in United States vs. Erie Railroad, 237 U. S., 339, 59 Law Ed., 1019. The Court says: "The hauling of the cars with defective equipment was clearly in contravention of the statute. While Section 4 of the Act of 1910 permit such cars to be hauled without liability for the statutory penalty, from the place where the defects are discovered to the nearest available point for making repairs, it distinctly excludes from this permission all cars which can be repaired at the place where they are found to be defective, and also declares that nothing therein shall be construed to permit the hauling of defective cars 'by means of chains instead of drawbars' in association with other cars in commercial use, unless the defective cars 'contain live stock or perishable freight.' Six of the cars that

were hauled while their equipment was defective could have been readily repaired at the place where the defects were discovered, which was before the hauling began. The remaining two were hauled by means of chains instead of drawbars in association with other cars in commercial use, and it is not claimed that they contained live stock or perishable freight."

We think that there was sufficient testimony to carry the case to the jury on the issues made by the pleadings and evidence in the case and his Honor committed no error in refusing to direct a verdict for the Defendant as asked for.

The Exceptions are overruled. Judgment affirmed.

We concur:
EUGENE B. GARY, *C. J.*
D. E. HYDRICK, *A. J.*

I concur under the authority of the former appeal.
T. B. FRASER, *A. J.*

I concur with justice Watts.
GEO. W. GAGE, *A. J.*

[Endorsed:] 9499. The State of South Carolina. In the Supreme Court, April Term, 1916. J. H. Lorick, Resp'd't, v. S. A. L. Rwy., Appel't. Affirmed. Opinion by R. C. Watts, A. J. We concur. Eugene B. Gary, C. J., D. E. Hydrick, A. J. I concur under the authority of the former appeal. T. B. Fraser, A. J. I concur with Justice Watts. Geo. W. Gage, A. J. Filed 7 Sept., 1916. U. R. Brooks, Clerk.

80 STATE OF SOUTH CAROLINA:

In the Supreme Court, April Term, 1916.

J. H. LORICK, Plaintiff-Respondent,
against
SEABOARD AIR LINE RAILWAY, Defendant-Appellant.

Petition for Stay of Remittitur.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of South Carolina:

Your Petitioner, Seaboard Air Line Railway, Defendant-Appellant, in the above cause, respectfully represents:

That there is a Federal question in this cause which was decided against your petitioner by this court in its opinion and judgment recently filed, to wit, the question whether there was any evidence to render your petitioner liable for damages to plaintiff under the Act of Congress known as the Federal Employers' Liability
81 Act, and that such question is reviewable by the Supreme Court of the United States.

Your petitioner further represents that it is its bona fide purpose to carry this case to the Supreme Court of the United States by writ of error without delay and with every effort to hasten a final adjudication in the same; but it will be much more convenient to all parties concerned to have the judgment stayed in the Supreme Court of South Carolina until the writ of error can be perfected.

Wherefore, your petitioner respectfully prays that this court do grant the order staying the remittitur for a period of thirty days, subject to the further order of this court.

SEABOARD AIR LINE RAILWAY,
By LYLES & LYLES, *Its Attorney.*

Order Staying Remittitur.

Upon reading the foregoing petition, it is ordered that the remittitur herein be stayed for a period of thirty days, subject to the further order of this court.

R. C. WATTS,
Associate Justice.

September 16, 1916.

82 THE STATE OF SOUTH CAROLINA:

In the Supreme Court.

J. H. LORICK, Plaintiff-Respondent,
vs.
SEABOARD AIR LINE RAILWAY, Defendant-Appellant.

Petition for Writ of Error.

Seaboard Air Line Railway, the above named defendant-appellant respectfully shows that on the seventh day of September, 1916, the Supreme Court of South Carolina, which is the highest Court in the State in which a decision in the action referred to herein could be had, rendered a judgment against your petitioner in a certain action in which J. H. Lorick was plaintiff, and your petitioner, Seaboard Air Line Railway, was defendant.

In said action, certain rights, privileges ad immunities were duly and specially set up and claimed by your petitioner under the Constitution and under statutes of the United States, and the decision of the Supreme Court of South Carolina was against the rights, privileges and immunities so set up and claimed, all of which will more fully and in more detail appear from the assignment of errors filed herewith.

Wherefore, and inasmuch as your petitioner feels aggrieved by the final decision of the Supreme Court of South Carolina in rendering the judgment against it in this action, it respectfully prays that a writ of error may issue from the Supreme Court of the United States to the Supreme Court of South Carolina for the correcting of the

errors complained of; that an order may be entered fixing the
83 amount of the supersedeas bond herein; that a duly authenti-
cated transcript of the record of the proceedings herein in said Supreme Court of South Carolina be sent to the Supreme Court of the United States; and that the decision and judgment of the Supreme Court of South Carolina herein may be reversed and annulled.

J. B. S. LYLES,
Attorney for Seaboard Air Line Railway.
Chief Justice of the Supreme

STATE OF SOUTH CAROLINA:

Supreme Court.

Let the writ of error above prayed for issue upon the execution of a bond by Seaboard Air Line Railway, payable to J. H. Lorick, in the sum of Three Thousand Dollars, such bond, when approved, to act as a supersedeas.

EUGENE B. GARY,
Court of South Carolina.

October 4th, 1916.

84 Supreme Court of the United States.

No. —.

SEABOARD AIR LINE RAILWAY, Plaintiff in Error,
vs.
J. H. LORICK, Defendant in Error.

Assignment of Errors and Prayer for Reversal.

Now comes Seaboard Air Line Railway, the above named plaintiff in error, and files herewith its petition for a writ of error and says there are errors in the record and proceedings in the above entitled cause, and for the purpose of having the same reviewed in the Supreme Court of the United States, makes the following assignment:

The Supreme Court of South Carolina erred in its construction and application to the facts in this case of the Federal Employers' Liability Act, a statute of the United States, approved on the 2nd day of April, 1908, and the Act amendatory thereto, approved on the 5th day of April, 1910, and the Federal Safety Appliance Act of Congress of 1893, as amended in 1903 and 1910.

That by these errors, the Supreme Court of South Carolina decided against certain titles, rights, privileges and immunities claimed
under said statutes, which were duly and specially set up and
85 claimed by the defendant (plaintiff in error) in these proceedings.

The said errors are more particularly set forth as follows:

1. That the Supreme Court of South Carolina erred in reversing the

order and judgment of nonsuit rendered and entered in favor of plaintiff in error (defendant below) in the Court of Common Pleas for Lexington County on the first trial of said cause at the February Term, 1915: and said Supreme Court of South Carolina erred in holding, on said first appeal taken by defendant in error (plaintiff below), that the evidence admitted of any other inference than that plaintiff below assumed the risks, and erred in remanding the cause for trial and submission to the jury on this issue.

2. That the Supreme Court of South Carolina erred in affirming the judgment of the Court of Common Pleas for Lexington County, on the second appeal taken to said court by the plaintiff in error (defendant-appellant below), and erred in affirming the ruling and judgment of said Court of Common pleas in refusing to direct a verdict in favor of plaintiff in error (defendant below) upon the ground:

"That the only reasonable inference to be drawn from the testimony, is that plaintiff assumed the risks and dangers in attempting to lift the coupler with his shoulder, within the meaning of the Federal Employers' Liability Act."

When said Supreme Court of South Carolina should have reversed said ruling and judgment of said Court of Common Pleas and itself entered a verdict and judgment in favor of plaintiff in error (defendant-appellant below) upon such ground.

86 This was defendant's (plaintiff in error's) Exception II on the second appeal.

3. That the Supreme Court of South Carolina erred in affirming the ruling and judgment of the Court of Common Pleas for Lexington County in refusing to direct a verdict in favor of plaintiff in error (defendant below) upon the ground:

"That there is no evidence tending to show any negligence on the part of the defendant, within the allegations of the complaint, having a casual connection with the injuries of which plaintiff complains, within the provisions of the Federal Employers' Liability Act."

When said Supreme Court should itself have entered a verdict and judgment in favor of plaintiff in error (defendant-appellant below) upon this ground.

This was defendant's Exception I on the second appeal.

4. That the Supreme Court of South Carolina erred in deciding and adjudging that section four of the Safety Appliance Act of Congress of 1893, as amended in 1903 and 1910, required that either the defendant below, or the plaintiff below as its agent, should have made such repairs on the spot, meaning thereby at the interchange yard in or near Columbia, South Carolina, where plaintiff below was working; and erred in deciding and adjudging the said Federal Statute forbade the defendant below, by its agents and servants, from shopping said car, meaning thereby, sending it across the Congaree River to the yards of defendant below at Cayce. And said Supreme Court of South Carolina erred in deciding and adjudging that the said Federal Statute in anywise took away from plaintiff below his entire freedom of judgment in exercising his discretion as to what

repairs he should make at the interchange yards, with the ap-
87 pliances furnished him, or for what repairs he should send the cars to the shops; acting under the instructions of his superior officer.

Wherefore, for these and other manifest errors appearing in the record, the said Seaboard Air Line Railway, defendant (plaintiff in error) prays that this judgment of the Supreme Court of South Carolina, filed September Seventh, 1916, be reversed, set aside and held for nought, and that judgment be rendered for this defendant (plaintiff in error) granting its rights under the Constitution and Statutes of the United States, and the defendant (plaintiff in error) also prays for judgment for costs in its favor.

J. B. S. LYLES,
Attorney for Seaboard Air Line Railway,
Defendant (Plaintiff in Error).

87½ [Endorsed:] State of South Carolina. In the Supreme Court. J. H. Lorick, plaintiff-respondent, vs. Seaboard Air Line Railway, defendant-appellant. Petition for Writ of Error, Order of Allowance, Assignment of Errors and Prayer for Reversal. J. B. S. Lyles, Attorney for S. A. L. Ry. Filed Supreme Court of South Carolina, October 9, 1916. U. R. Brooks, Clerk South Carolina Supreme Court.

88 UNITED STATES OF AMERICA:

The President of the United States of America to the Honorable the Justices of the Supreme Court of the State of South Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court, before you, or some of you, being the highest Court of law or equity of the State in which a decision could be had in the said suit between J. H. Lorick and Seaboard Air Line Railway, a corporation, wherein was drawn in question the construction of a clause of the Constitution, and a statute of the United States, and the decision was against the title, right, privilege or immunity specially set up or claimed under such clause of the said Constitution and the said statute; a manifest error hath happened, to the great damage of the said Seaboard Air Line Railway, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, D. C., within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States, should be done.

89 Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, the fourth day of October, in the year of our Lord one thousand nine hundred and sixteen.

[Seal United States District Court, Eastern District So. Ca.]

RICHARD W. CHETSON,
Clerk District Court of the United States,
Eastern District of South Carolina.

Allowed:
EUGENE B. GARY,
Chief Justice of the Supreme Court of South Carolina.

October 4th, 1916.

89½ [Endorsed:] State of South Carolina. In the Supreme Court. J. H. Lorick, Plaintiff-Respondent, vs. Seaboard Air Line Railway, Defendant-Appellant. Writ of Error. J. B. S. Lyles, Attorney for S. A. L. Ry. Filed Supreme Court South Carolina, October 9, 1916. U. R. Brooks, Clerk Supreme Court South Carolina. Original.

90 The Supreme Court of South Carolina.

SEABOARD AIR LINE RAILWAY, Plaintiff in Error,
vs.
J. H. LORICK, Defendant in Error.

Bond.

Know all men by these presents, That we, Seaboard Air Line Railway Company, a consolidated corporation of the States of Virginia, North Carolina and South Carolina, and the successor of Seaboard Air Line Railway, above named, the principal office of which is in the City of Portsmouth, in the State of Virginia, as principal, and Fidelity & Deposit Company of Maryland, as surety, are held and firmly bound unto J. H. Lorick in the full and just sum of Three Thousand ($3,000) Dollars, for the payment of which sum well and truly to be made, we hereby jointly and severally bind ourselves and each of our successors and assigns firmly by these presents.

Sealed with our Seals, and dated this twenty-seventh day of September, A. D. 1916.

Whereas, lately at a hearing had before the Supreme Court of South Carolina, in a suit pending in said Court, between the said J. H. Lorick, as plaintiff-respondent, and said Seaboard Air Line Railway, as defendant-appellant, a final judgment was rendered against said Seaboard Air Line Railway, and said Seaboard Air Line Railway seeks to prosecute its writ of error to the Supreme Court of the United States to reverse said final judgment.

91 Now, therefore, the condition of this obligation is such that if the Seaboard Air Line Railway, as plaintiff in error,

shall prosecute its said writ of error and answer all costs and damages that may be adjudged against it, if it shall fail to make good its plea, then this obligation shall be void; otherwise, to remain in full force and effect.

SEABOARD AIR LINE RAILWAY COMPANY,
By W. L. SEDDON, *Its Vice-President.*

Attest:
ROB'T L. NUTT,
Its Ass't Sec't'y.

Witnesses as to Seaboard Air Line Railway Company:
C. D. ARNOLD.
C. B. BROOKS.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,
By R. BEVERLEY SLOAN, *Attorney in Fact.*

Attest:
JAMES A. CATHCART,
General Agent.

Witnesses as to Fidelity & Deposit Company of Maryland:
H. C. WHITE.
JOHN E. BLACK.

92 STATE OF VIRGINIA,
City of Norfolk:

Personally appeared C. D. Arnold, before me, a Commissioner of Deeds for the State of South Carolina, in the State of Virginia, and made oath that he was present and saw Seaboard Air Line Railway Company by W. L. Seddon, its Vice President, sign, seal and as the act and deed of said corporation, deliver the within written instrument; and that he with C. B. Brooks, witnessed the execution thereof.

C. D. ARNOLD.

Sworn to and subscribed before me this 30th day of Sept., A. D. 1916.

S. B. PARKINSON, [L. S.]
Commissioner of Deeds for the State of South Carolina in the State of Virginia.

My Commission expires at the will of the Governor.

STATE OF SOUTH CAROLINA,
Richland County:

Personally appears H. C. White, who, on oath, says that he saw Fidelity & Deposit Company of Maryland, by R. Beverley Sloan, its attorney in fact, and James A. Cathcart, General Agent, sign, seal,

and, as its act and deed, deliver the above and foregoing in-
93 strument for the uses and purposes therein mentioned, and that he, with John E. Black, witnessed the execution thereof.

H. C. WHITE.

Sworn to and subscribed before me this 2nd day of October, A. D. 1916.

JOHN E. BLACK, [L. S.]
Notary Public for South Carolina.

Bond approved and to act as supersedeas:

EUGENE B. GARY,
Chief Justice Supreme Court South Carolina.

October 4th, 1916.

94 [Endorsed:] State of South Carolina. In the Supreme Court. J. H. Lorick, Plaintiff-Respondent, vs. Seaboard Air Line Railway, Defendant-Appellant. Bond. Filed Supreme Court South Carolina, October 9, 1916. U. R. Brooks, Clerk South Carolina Supreme Court. Copy.

95 UNITED STATES OF AMERICA:

The President of the United States to J. H. Lorick, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of South Carolina, wherein Seaboard Air Line Railway is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Eugene G. Gary, Chief Justice of the Supreme Court of South Carolina, this the fourth day of October, 1916.

EUGENE B. GARY,
Chief Justice of the Supreme Court of the State of South Carolina.

Attest:

[Seal Supreme Court of South Carolina.]

U. R. BROOKS,
Clerk of the Supreme Court of the State of South Carolina.

STATE OF SOUTH CAROLINA,
Richland County:

I, the undersigned attorney of record for the defendant in error

in the above entitled cause, hereby acknowledge due service
96 of the above citation, and enter an appearance for said defendant in error in the Supreme Court of the United States, this 7 day of October, 1916.

FRANK G. TOMPKINS,
Attorney of Record for J. H. Lorick.

96½ [Endorsed:] Supreme Court of the United States. J. H. Lorick, Defendant in Error, vs. Seaboard Air Line Railway, Plaintiff in Error. Citation. J. B. S. Lyles, Attorney for S. A. L. Ry. Filed Supreme Court South Carolina, October 9, 1916. U. R. Brooks, Clerk Supreme Court South Carolina. Original.

97 Supreme Court of the State of South Carolina,

Certificate of Lodgment.

I, U. R. Brooks, Clerk of the Supreme Court of South Carolina, do hereby certify that there was lodged with me, as such Clerk, on October 9, 1916, in the matter of J. H. Lorick against Seaboard Air Line Railway, a corporation:

1. The original bond, of which a copy is herein set forth.
2. Two copies of the writ of error herein set forth—one for plaintiff and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in Columbia, South Carolina, this October 9, 1916.

[Seal Supreme Court of South Carolina.]

U. R. BROOKS,
Clerk Supreme Court South Carolina.

98 Supreme Court, State of South Carolina.

Authentication of Record.

I, U. R. Brooks, Clerk of said Court, do hereby certify that the foregoing pages numbered from 1 to 97, inclusive, are a true, full and complete transcript of the record and proceedings in the case of J. H. Horlick, plaintiff-respondent, vs. Seaboard Air Line Railway, defendant-appellant; and also, of the opinions and judgment of the Court rendered therein.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Columbia, South Carolina, this October 9, 1916.

[Seal Supreme Court of South Carolina.]

U. R. BROOKS,
Clerk Supreme Court South Carolina.

99 UNITED STATES OF AMERICA:

Supreme Court of South Carolina.

J. H. LORICK, Plaintiff-Respondent,
vs.
SEABOARD AIR LINE RAILWAY, Defendant-Appellant.

Return to Writ.

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning same.

In witness whereof, I hereunto subscribe my name and affix the seal of the said Supreme Court of South Carolina, in the City of Columbia, this October 9, 1916.

[Seal of the Supreme Court of South Carolina.]

U. R. BROOKS,
Clerk Supreme Court, South Carolina.

Costs of Suit.

Plaintiff's costs $—, paid by Seaboard Air Line Railway.
Defendant's costs $—, paid by Seaboard Air Line Railway.
Costs of transcript $30.00, paid by Seaboard Air Line Railway.

U. R. BROOKS,
Clerk Supreme Court, South Carolina.

100 THE STATE OF SOUTH CAROLINA:

In the Supreme Court.

J. H. LORICK, Plaintiff-Respondent,
vs.
SEABOARD AIR LINE RAILWAY, Defendant-Appellant.

Præcipe.

To U. R. Brooks, Clerk Supreme Court of the State of South Carolina:

SIR: The plaintiff in error, defendant-appellant above entitled, requests that you incorporate into the transcript of the record which you are to send to the Supreme Court of the United States, in accordance with the directions contained in the writ of error in the above stated cause, now on file in your office, the following:

1. The printed record filed as the "Case and Exceptions" on the first appeal, except you will omit therefrom as follows:

(*a*) Omit beginning with "Q. State where those cars were going that you were required to inspect and make minor repairs?" on page

11, f. 41, and ending with page 15, f. 59. Beginning with page 17 and ending with "Q. Independent of who keeps it, there is such a record kept? A. Yes, sir." on page 21, f. 82.

(*b*) Beginning with page 23 and ending with "The Court: I can not sustain the objection." on page 25, f. 97.

101 2. The printed record constituting the "Case with Exceptions" on the second appeal, except you will omit therefrom the following portions:

(*a*) Omit from the printed record beginning with "Complaint", page 2, f. 6, and ending with "Attorneys for Defendant" on page 6, f. 22, and insert in lieu thereof the following statement: "The Complaint and the Answer were the same as on the first appeal and are correctly printed in the Case and Exceptions on the first appeal."

3. Include all portions of the record in the cause beyond that above specified to be omitted.

J. B. S. LYLES,
Attorney for Seaboard Air Line Railway, Plaintiff in Error.

STATE OF SOUTH CAROLINA,
Richland County:

I, attorney of record for J. H. Lorick, defendant in error, acknowledge service of the above and foregoing Præcipe, and I further stipulate that the record therein called for contains all of the record and testimony presented to the Supreme Court of South Carolina that in anywise appertains or relates to the questions to be presented to the Supreme Court of the United States on this writ of error.

FRANK G. TOMPKINS,
Attorney for J. H. Lorick, Defendant in Error.

October 7, 1916.

102 [Endorsed:] Supreme Court of United States. — Term, 1916. Transcript of Record. Seaboard Air Line Railway, Plaintiff in Error, vs. J. H. Lorick, Defendant in Error. In Error to the Supreme Court of South Carolina. Filed Supreme Court of South Carolina, October 9, 1916. U. R. Brooks, Clerk.

Endorsed on cover: File No. 25,592. South Carolina Supreme Court. Term No. 762. Seaboard Air Line Railway, plaintiff in error, vs. J. H. Lorick. Filed November 2d, 1916. File No. 25,592.

Addendum to Record.

Supreme Court of the United States, October Term, 1916.

No. 762.

SEABOARD AIR LINE RAILWAY, Plaintiff in Error,
vs.
J. H. LORICK.

In Error to the Supreme Court of the State of South Carolina.

(Opinion of Supreme Court of South Carolina on First Appeal.)

"Before Memminger, J., Lexington, February, 1915. Reversed.

"Action by J. H. Lorick against Seaboard Air Line Railway brought under the Federal Employers' Liability Act for an injury sustained by him while engaged in repairing a coupler to a car which had become out of repair, in transit from some point on the line of the Seaboard Air Line Railway to a point without the State of South Carolina.

"The car was being repaired by reason of the fact that a connecting road, to which it had been tendered, had refused to receive it until repairs were made.

"The testimony tended to show that the plaintiff, a car inspector, was not provided with a jack, which was necessary to make the repairs he was required to make, and that he had on several occasions complained to his superior officers, agents of the Seaboard Air Line Railway, that he should be provided with such appliance, and the promise had been made to him, the last time, about three weeks before the accident, that a jack would be furnished him.

"Not having the necessary appliance, the only way in which he could raise this coupler was to use his shoulder and press it up, and, in doing so, he sustained an injury for which the action was brought.

"At the close of plaintiff's evidence, the defendant moved for a nonsuit on the ground that the plaintiff had assumed the risk of the work and that there was no compulsion for him to do this work at that time.

"From order granting the nonsuit, plaintiff appeals.

* * * * * * *

"October 14, 1915.

"The opinion of the Court was delivered by Mr. Justice WATTS.

The exception raises but one point, and that is that the presiding Judge erred in granting the nonsuit, when the evidence showed facts

that should have been submitted to the jury for their determination. It is conceded by both sides that the plaintiff brought his case under the Federal Employers' Liability Act, as it was shown clearly by the evidence that the car was to be taken from one State to another State, and was engaged in interstate commerce at the time plaintiff was making repairs on it. This being the case, the Federal Safety Appliance Act also applies (36 Stat. at L. 298, chap. 160, Compiled Stats. 1913, sec. 8617). Section 4 of this act, known as the act of 1893 (act of March 2, 1893, 27 Stats. 531), as amended in 1903 and 1910 (act April 14, 1910, c. 160, 36 Stats. 299, U. S. Comp. St. 1913, sec. 8621), is as follows: 'That any common carrier subject to this act using, hauling, or permitting to be used or hauled on its line, any car subject to the requirements of this act not equipped as provided in this act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered as provided in section six of the act of March 2, 1893, as amended April 1, 1896: Provided, That where any car shall have been properly equipped, as provided in this act and the other acts mentioned herein, and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired, without liability for the penalties imposed by section 4 of this act or section 6 of the act of March 2, 1893, as amended by the acts of April 1, 1896, if such movement is necessary to make such repairs, and such repairs can not be made except at such repair point; and such movement of hauling of such car shall be at the sole risk of the carrier, and nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employee caused to such employeee by reason of or in connection with the movement or hauling of such car with equipment which is defective or insecure or which is not maintained in accordance with the requirements of this act and the other acts herein referred to; and nothing in this proviso shall be construed to permit the hauling of defective cars by means of chains instead of drawbars, in revenue trains or in association with other cars that are commercially used, unless such defective cars contain live stock or "perishable" freight'.

"The provision of this section applicable to the question has been construed by the opinion of the Supreme Court of the United States in the case of United States v. Erie Railroad Company, 237 U. S. 402, 35 Sup. Ct. Reporter 621, where the following language is used: 'The hauling of the cars with defective equipment was clearly in contravention of the statute. While section 4 of the act of 1910 permits such cars to be hauled without liability for the statutory penalty, from the place where the defects are discovered to the nearest available point for making repairs, it distinctly excludes from this permission all cars which can be repaired at the place where they are found to be defective, and also declares that nothing therein shall be construed to permit the hauling of defective cars by means of chains instead of

drawbars in association with other cars in commercial use, unless the defective cars "contain live stock or perishable freight." Six of the cars that were hauled while their equipment was defective could have been readily repaired at the place where the defects were discovered, which was before the hauling began. The remaining two were hauled by means of chains instead of drawbars in association with other cars in commercial use, and it is not claimed that they contained live stock or perishable freight.'

"This act applies to all trains of cars engaged in interstate commerce and all vehicles in connection therewith. Southern Railway Company v. United States, 222 U. S. 20, 55 Law Ed. 72, 32 Sup. Ct. Reporter 2. The evidence in this case shows that the defendant was engaged in transferring the defective car in question from one State to another, and comes within the meaning of the Federal Employers' Liability Act of April 22, 1908.

"It is the settled law of this State, that the servant assumes the ordinary risk incident to his labor, but he does not assume such risks as may be caused by the master negligently failing to furnish suitable appliances to perform his work, but if the servant continues in the service with knowledge of such defective appliances he is deemed to have waived the master's negligence, and to have assumed the risk in spite of the master's negligence; but if he complains of, and calls attention to the defect, and there is a promise on the part of the master to furnish such suitable appliances as it is his duty to do, and the employee, while remaining thereafter in the master's service is injured, it is a question for the jury to determine whether the employee, by remaining in the master's service, assumes such risk.

'"The remaining in master's service by an employee, after knowledge of an alleged defect in the instrumentalities to be furnished by the master, is not, as a matter of law, an assumption of risk by the employee. Whether the employee assumed the risk, is a question for the jury, to be determined from all the circumstances of the case.'" Mew v. Railroad Company, 55 S. C. 101, 32 S. E. 828. 'A promise by the master to remedy a defect tends to rebut the inference of waiver of the defect by the servant's remaining in the master's service after knowledge. If the servant continued in discharge of his duties, relying on the master's promise to remove the defect, he could not be said to have waived such defect. The jury was the tribunal to determine this question in this case.' Powers v. Oil Company, 53 S. C. 363, 31 S. E. 276. As to the same principle, see Bodie v. Railway Company, 61 S. C. 478, 39 S. E. 715; McCarley v. Manufacturing Company, 75 S. C. 390, 56 S. E. 1; Hankinson v. Railroad Company, 94 S. C. 154, 77 S. E. 863.

"The law of assumption of risk as settled by the Supreme Court of the United States in Seaboard Air Line Railway v. Horton, 233 U. S. 504, 34 Sup. Ct. Reporter 635, 58 Law Ed. 1070, 55 L. R. A. (N. S.) 1915*c*, 1, 36 A. & E. Ann. Cas. 1915*b*, 475 is as follows: "* * * Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages. And a workman of mature years is taken to assume

risks of this sort, whether he is actually aware of them or not. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them. These distinctions have been recognized and applied in numerous decisions of this Court. (Here the Court cites number of cases.) * * *

'When the employee does know of the defect, and appreciates the risk that is attributable to it, then if he continues in the employment without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employee assumes the risk, even though it arise out of the master's breach of duty. If, however, there be a promise of reparation, then during such time as may be reasonably required for its performance, or until the particular time specified for its performance, the employee, relying upon the promise, does not assume the risk unless at least the danger be so imminent that no ordinarily prudent man under the circumstances would rely upon such promise.' (Here the Court cites number of cases.)

"It has also been held where there is a conflict of testimony as to the assumption of risk, it is a question to be decided by the jury.

"This has always been the law of this State, and so, also, determined by the Supreme Court of the United States in Bridgett McGovern v. Philadelphia and Reading Railway Company, 235 U. S. 389, 35 Sup. Ct. R. 127. So neither under the State law, nor under the Federal law, could this issue be determined without submission to the jury. His Honor was in error in granting the nonsuit, and the order of nonsuit must be set aside and reversed.

"Reversed.

"Mr. Chief Justice Gary and Messrs. Justices Hydrick and Gage concur in the opinion of the Court.

"Mr. Justice Fraser, dissenting: I dissent. I think the evidence shows that the plaintiff injured himself."

I hereby certify that the above and foregoing is a true and correct copy of the opinion of the Supreme Court of South Carolina rendered on the first appeal in this case.

[Seal Supreme Court of South Carolina.]

U. R. BROOKS,
Clerk of the Supreme Court of South Carolina.

I consent to the above being filed as an addendum to the record in this case.

MATTH. G. TOMPKINS,
Attorney for Defendant in Error.

[Endorsed:] 762/25,592. Supreme Court of the U. S. Seaboard Air Line Railway, Plaintiff in Error, vs. J. H. Lorick. Addendum to Record.

[Endorsed:] File No. 25,592. Supreme Court U. S., October Term, 1916. Term No. 762. Seaboard Air Line Railway, plaintiff in error, vs. J. H. Lorick. Addition to Record. Filed January 4, 1917.

INDEX

AUTHORITIES CITED.

Supreme Court of the United States

OCTOBER TERM, 1916.

No. 762.

SEABOARD AIR LINE RAILWAY, PLAINTIFF IN ERROR.

vs.

J. H. LORICK.

BRIEF FOR PLAINTIFF IN ERROR IN OPPOSITION TO MOTION TO DISMISS OF AFFIRM AND ON THE MERITS.

J. B. S. LYLES,
Attorney for Plaintiff in Error.

STATEMENT.

This writ brings up a judgment of the Supreme Court of South Carolina affirming a judgment of fifteen hundred dollars ($1,500.00) in favor of plaintiff, entered on the verdict of a jury at the November, 1915, term of the Court of Common Pleas for Lexington County, in a suit under the Federal Employers' Liability Act. The case was first tried at the February, 1915, term of the Court of Common Pleas for Lexington County, which trial resulted in a judgment of nonsuit, upon the ground that plaintiff had assumed the risk. The Supreme Court of South Carolina reversed this order and judgment of nonsuit in its opinion filed October 14, 1915, (the opinion on this first appeal was omitted from

the Record through inadvertence, but is printed as an addendum to the Record).

PLEADINGS.

The plaintiff alleged that he was employed in interstate commerce by defendant as a car inspector in the City of Columbia, and as such, was required to inspect and make repairs to certain cars. That on May 7, 1913, he was called upon, in the performance of his duties, to repair a "Rutland" car which had been tendered to the Southern Railway by defendant and had been refused because the draft bolts and coupler were defective (R., pp. 2-3). That plaintiff was not furnished with a jack with which to raise such defective coupler, although he had previously made demand for a jack suitable for this work, which was frequently done by him, and although defendant had promised, within a reasonable time before the injury, to furnish him with such a jack. That in the absence of the jack the plaintiff undertook to repair the coupler by placing his shoulder under it and raising it, which resulted in the fracture of his shoulder blade and injuries to the ligaments of his shoulder, etc. The only negligence alleged as a cause of the injuries was a failure to furnish the jack.

The answer set up a general denial and the defenses of assumption of risks and contributory negligence (R. pp. 3-4).

STATEMENT OF EVIDENCE.

Plaintiff was employed in what may be called the interchange yards in Columbia. In these yards the Seaboard delivers cars to the Southern and Coast Line, and these two other roads deliver cars to the Seaboard (R., pp. 20-21, 33). Plaintiff's foreman was F. N. Jones, who was located across the Congaree River at Cayce (p. 21). Neither Jones nor plaintiff knew what cars that the Seaboard

would bring into the interchange yards for delivery to the Southern or A. C. L., or what cars either of these other roads would bring there for delivery to the Seaboard (pp. 21-22, 34). It follows that neither plaintiff nor Jones knew the character of the defect that would appear in any of these cars, or the character of work that plaintiff would be called upon to do. Plaintiff's instructions required him to do all of the work that he could possibly do to get the cars out. Jones testified: "Q. What instructions had you given him; what sort of repairs was he to do on those cars in that yard? A. All repairs he could possibly do to get the cars out. Q. To have them accepted by the other roads? A. Yes, sir" (p. 34); and, on cross-examination, "to do all the work he could possibly do, and what he could not do to send it to the rip track" (p. 41). In other words, plaintiff was to exercise his judgment, since no one knew what cars were coming in there and what repairs he would be called upon to make. He was to exercise his judgment as to whether he could do the work. If so, he was to do it; if not, he was to shop the car (R., pp. 34-36, 37, 39-41). Plaintiff's testimony as to his instructions on cross-examination was not to the contrary (R., pp. 22-23).

Plaintiff testified that he had asked Jones on several occasions to furnish him a jack, and that Jones had replied that he did not have any, but would get them (R., pp.17, 23-24). His last request for a jack was something like three weeks before the injury.

Jones testified that before his office was moved from Columbia to Cayce, about five months before plaintiff's alleged injury, Mr. Lorick asked him for a light jack, that he had two of these jacks and offered Lorick one, and that Lorick never asked for a jack after this; that he had jacks on hand which Lorick could have gotten if he wanted them (p. 37).

The coupler that plaintiff undertook to lift was a piece of iron or steel, about 5x7 feet, weighing from 275 to 400 pounds. It was all open and apparent to the eye (R., p. 38).

Plaintiff undertook to lift the coupler by squatting down and putting his shoulder under it, and then raising it up (p. 17). This manner of lifting the coupler without a jack was unnecessary and dangerous (R., pp. 42, 43-44).

If plaintiff had shopped this car he would have been within his instructions, and there would have been no criticism (R., p. 36).

MANNER IN WHICH ISSUES ARISE.

Upon the conclusion of the plaintiff's testimony on the first trial, defendant duly made a motion for nonsuit upon the ground that plaintiff had assumed the risks under the Federal Act, which motion was granted and judgment duly entered in defendant's favor on said order (R., pp. 11-13). Plaintiff appealed from this judgment and in its opinion filed October 14, 1915, the Supreme Court of South Carolina reversed this judgment and sent the case back for a new trial. (See addendum to Record.) This ruling is brought up by assignment of error, numbered I (R., pp. 51-52). Upon the second trial the defendant duly made a motion for a directed verdict in its favor upon the ground of assumption of risk (R., p. 46), and excepted to the refusal of this motion in the Supreme Court of South Carolina (R., p. 46). The ruling of the Supreme Court of South Carolina on this motion is brought up by assignment, numbered II (R., p. 52).

On the second trial the defendant also made a motion for a directed verdict upon the ground that there was no evidence of negligence within the Federal Act (R., p. 46) and duly excepted to the refusal of the trial court in refusing this motion (R., p. 46), and brings up the ruling of the Supreme Court of South Carolina on this point by assignment numbered III (R., p. 52).

The defendant also brings up the ruling of the Supreme Court of South Carolina in construing the Safety Appliance Act as requiring that the repairs on this particular

car should have been made on the spot, and forbidding defendant below, or plaintiff below as its agent, from sending such car across the Congaree River to the yards of defendant at Cayce for the purpose of having the repairs made there. Assignment of error, numbered IV (R., p. 52).

SPECIFICATION OF ERRORS RELIED ON.

Specification First.

Error in holding that there was evidence of negligence on the part of defendant having a casual connection with the injuries with which plaintiff complains, within the provisions of the Federal Employers' Liability Act. Assignment of error, numbered III (R., p. 52).

Specification Second.

Error in holding that there was any other reasonable inference to be drawn from the testimony than that plaintiff assumed the risks and dangers in attempting to lift the coupler with his shoulder, within the meaning of the Federal Employers' Liability Act. Assignments of error, numbered I and II (R., pp. 51-52).

Specification Third.

Error in construing the Safety Appliance Act of Congress as requiring plaintiff below, as agent of defendant below, to make the repairs to this car on the spot, and forbidding plaintiff below, as agent of defendant below, from sending the car across the Congaree River to the yards of the defendant at Cayce for the purpose of having the repairs made there. Assignment of error, numbered IV (R., p. 52).

THE MOTION TO DISMISS.

Authorities Cited.

Seaboard A. L. R. Co. vs. Horton, 233 U. S., 492, 239 U. S., 595.
St. Louis I. M. and S. R. Co. vs. McWhirter, 229 U. S., 265.
Seaboard A. L. R. Co. vs. Padgett, 236 U. S., 668.
Great Northern R. Co. vs. Wiles, 240 U. S., 444.

Specifications First and Second—Assignments of error numbered I, II and III, raise questions which plaintiff in error has the right to have reviewed by this Court under the decisions of this Court in the cases above cited. These questions "in their essence, involve the existence of the right in the plaintiff to recover under the Federal Statute to which his recourse by the pleadings was exclusively confined, or the converse, that is to say, the right of the defendant to be shielded from responsibility under that statute because, when properly applied, no liability on his part from the statute would result." (McWhirter case.)

Specification Second raises the identical jurisdictional question presented on the second writ of error in the Horton case.

Specification Third—Assignment of error numbered IV—also raises a question that plaintiff in error is entitled to have reviewed by this Court. The Supreme Court of South Carolina justifies the plaintiff below in endeavoring to make the repairs to this car on the spot by virtue of the construction which it gives to the Safety Appliance Act of Congress. The testimony was clear that plaintiff below had in fact the election to exercise his judgment as to what repairs he would make without the jack. The Supreme Court of South Carolina says that the Safety Appliance Act required him to make these particular repairs on the spot and took away his freedom of judgment. The Supreme Court of South Carolina bases its affirmance of the judgment in favor of plaintiff upon this erroneous construction

of the Federal Act, and plaintiff in error is entitled to have this construction reviewed in this Court.

THE MOTION TO AFFIRM.

We contend that under these authorities there can be no doubt that these assignments of error on their face embrace Federal questions which give this Court the jurisdiction to review. We contend, further, that they are not so wanting in foundation and so unsubstantial as to be devoid of merit and frivolous within the doctrine of *S. A. L. Ry. vs. Padgett, supra.* We respectfully refer the Court to our argument, which follows in substantiation of this point.

MERITS.

Specification First.

Authorities Cited.

Bodie vs. Ry., 61 S. C., 468, 489.
Cannon vs. Lockhart Mills, 101 S. C., 59.
Gowen vs. Harley, 56 Fed., 973, 6 C. C. A., 190.
Scheffer vs. Washington, etc., Ry., 105 U. S. (15 Otto), 249.
Stephens vs. Ry., 82 S. C., 542.
St. Louis I. M. and S. R. Co. vs. McWhirter, 229 U. S., 265.

Plaintiff's instructions to do all the work he could possibly do and to shop the cars that he could not repair, necessarily called upon him for the exercise of his own judgment as to what work he could do. His instructions meant that he was to do the work he could do with the tools and appliances that he had. If he did not have a jack, he was only called upon to do the work that he could do without a jack. If there had been a representative of the master on the spot

who had ordered the plaintiff to raise this particular coupler without a jack, the case would have been far different. If there had been such an order from a representative of the master on the spot requiring the plaintiff to do this obviously dangerous thing, or requiring plaintiff to do this work in an obviously dangerous manner, then it would have been a question for the jury whether the issuance of this order was negligence on the part of the representative of the master. But even then, the plaintiff would have been guilty of negligence in obeying such an order of the representative of the master, under the doctrine of *Stephens vs. Sou. Ry.*, 82 S. C., 542. In the absence of any such order from a representative of the master on the spot, plaintiff being free to exercise his judgment to repair the car or to shop the car, it must be conceded that the plaintiff was guilty of negligence in undertaking to lift the coupler with his shoulder, in the manner which he did, without the assistance of a jack. When a servant has the election of a safe and a dangerous manner in which to do his work, and voluntarily adopts the dangerous manner, then this choice is negligence on his part (*Bodie vs. Ry.*, 61 S. C., 468, 489); and here, when we bear in mind that the only effect that the absence of jacks would have had was to authorize plaintiff to decide what work he could not do without jacks, then we see that the negligence of plaintiff was the only negligence in the case; and that the failure to furnish jacks was not evidence of negligence, under the circumstances of this case.

When we bear in mind that plaintiff had free election to do what work he could do without the jack and decide this question for himself, having the right to shop any car that he could not repair without jacks, it is clear that the failure to furnish jacks was no breach of duty on the part of defendant. The case being admittedly determined under the principles of the Federal Act, the decision in *Gowan vs. Harley*, 6 C. C. A., 190; 56 Fed., 973, is conclusive. In that case the plaintiff was employed about February 1, 1891, to clean cars, and it became his duty, with the assistance of

the porter, to transfer from one car to another a train box weighing about 200 or 250 pounds. There were handles on each end of this box, and the manner of transferring it was for the plaintiff to stand in the doorway of the car to which the box was going, lean out and catch one of the handles. The porter stood in the door of the other car holding a rope attached to the other handle, and in this way the box was swung across. On June 20, while they were doing this, the rope untied and plaintiff was thrown from the car. When plaintiff first entered the employment he asked the master mechanic for some skids on which to slide the box across, and was supplied with them and used them until some time in May, when he was taken sick and lost them. He returned to work May 20, and transferred the box by swinging it across until the accident on June 20. Between May 20 and June 20, he repeatedly asked the proper officers for skids and they were promised him. The last promise was made within three days of the accident. The Court specifically considered the question, amongst others, whether the failure to furnish the skids was a breach of the master's duty to furnish plaintiff with reasonable safe appliances with which to do his work, and reached the conclusion that it was not. The Court said in part:

"The master is not required to have his work done in the safest or most convenient way. He is not required to furnish tools for its performance if it can be performed with a reasonable degree of safety without them. The errand boy whose duty it is to climb the stairs in a high building daily cannot recover of an employer for a fall down the stairs on the ground that the latter had just promised to furnish him an elevator for his convenience or for his safety when the stairs themselves were reasonably safe. The mason who is placing heavy stones upon a wall by hand cannot recover of his employer if he takes up one that is too heavy for him and it falls upon his feet, on the ground that his employer had just promised to furnish him an inclined plane upon which he could roll the stones upon the wall. Nor can the plaintiff who was employed to carry this train box, without

tools or machinery, from one car to the other, recover here because the defendant had promised to provide him with planks or a skid on which he could slide it across. The rule that the master is responsible for damages resulting to a servant from defects in machinery and appliances of which the servant notified him, and which he has promised to repair, governs cases in which machinery or tools that are used in the work are discovered to be dangerously defective while in use, and to cases in which tools or machinery are necessary for the safe performance of the work. It has no application to a case where the service required is simple manual labor, without tools or machinery, and where no such tools or appliances are necessary to the performance of the work with a reasonable degree of safety. *Tuttle vs. Ry. Co.*, 122 U. S., 189, 194, 7 Sup. Ct. Rep., 1166; *Richards vs. Rough*, 53 Mich, 212, 216, 18 N. W. Rep., 785; *Hayden vs. Manufacturing Co.*, 29 Conn., 548, 558; *Marsh vs. Chickering*, 101 N. Y., 396, 400, 401, 5 N. E. Rep., 56."

The failure to furnish a jack was not the proximate cause of plaintiff's injuries. If there was any causal connection between the failure to furnish jacks and the injuries to plaintiff, the connection was remote in the legal sense. This failure may have been the occasion—it was not the cause. The proximate cause of plaintiff's injuries was his election to endeavor to raise the coupler with his shoulder. This was a voluntary act intervening between the original default and the final mischief, it was an independent cause, of itself sufficient to stand as a cause of the mischief. It was entirely unrelated and was not invited or induced, in the legal sense, by the failure to furnish a jack. The only thing defendant did was to fail to furnish a jack. Defendant did not suggest to the plaintiff to endeavor to do this obviously dangerous thing; defendant did not attempt to persuade plaintiff to do so. Defendant could not reasonably foresee that, if it failed to furnish plaintiff with a jack, he would undertake to squat down under a heavy iron coupler and endeavor to raise the same with his

shoulder. This was a voluntary act of plaintiff's, and was, therefore, not a proximate consequence of defendant's failure to furnish a jack, and this voluntary act of plaintiff could not reasonably be foreseen, according to the usual experience of mankind, and it was not, therefore, a natural and probable consequence of defendant's conduct. *Cannon vs. Lockhart Mills*, 101 S. C., 59; *Scheffer vs. Washington, etc. Ry.*, 105 U. S. (15 Otto), 249; *St. L. I. M. & S. R. Co. vs. McWhirter, supra.*

SPECIFICATIONS SECOND AND THIRD.

Authorities Cited.

Gowan vs. Harley, 56 Fed., 973, 6 C. C. A., 190.
St. L. I. M. & S. Ry. vs. McWhirter, 229 U. S., 265.
Seaboard A. L. R. Co. vs. Horton, 233 U. S., 492, 239 U. S., 595.
U. S. vs. Erie Rd., 237 U. S., 402.

It is convenient to consider these two specifications together as the alleged erroneous conclusion of the Court set out in Specification Second was induced by its erroneous construction of the Safety Appliance Act set out in Specification Third.

Section 4 of the Safety Appliance Act and the decision in *U. S. vs. Erie Rd. Co.*, 237 U. S., 402, cited by this Court in its first opinion, have no possible application to the case here made, for very obvious reasons.

The Safety Appliance Act, including Section 4, imposes a liability for personal injury only when there is a proximate causal connection between the hauling or using of the defective car in interstate commerce and the injuries sustained by the employee. *St. Louis, etc., Ry. vs. McWhirter*, 229 U. S., 265. The plaintiff's injuries here were received while he was repairing the defective car. The Erie case was a penalty suit by the United States.

Plaintiff relies on the Act only to justify his effort to repair the car without a jack instead of shopping it—

claiming that Section 4 required it. Section 4 requires no such thing. It says "the car may be hauled from the place where such equipment was first discovered to be defective or unsecure to the nearest available point where such car can be repaired, . . ., if such movement is necessary to make such repairs, and such repairs cannot be made at such repair point; . . .." There is no requirement that defendant should have had a repair force and appliances at these interchange yards sufficient to make all possible repairs to safety appliances discovered in such yards. In the Erie case: "All of the defects were discovered in the yards from which the cars were moved, and those in six of the cars could have been readily repaired in those yards by the local force of car repairers consisting of seven men at Jersey City and five at Weehawken." Is there any suggestion that the Act required the carrier to keep any particular force at these or any other particular yards? The Act does not say so, and, if so, why does the Court proceed? "The defects in two of the cars were serious, and as to them Bergen may have been the nearest available point for making the necessary repairs." Why was not the carrier required to keep a sufficient force at Jersey City and Weehawken to repair there all defective safety appliances? The carrier moved these two last cars to Bergen "by means of chains instead of draw bars . . . in association with other cars that are commercially used . . .." which the last proviso of Section 4 forbids absolutely, and for this reason was held to have violated this section.

Plaintiff was the representative of defendant to determine which cars he could repair at the interchange yards, with such appliances as he had, and which cars must be moved to Cayce for repairs. Section 4 did not require defendant to give him more assistance or furnish him with more appliances. It has absolutely no application.

Plaintiff's contention upon the trial, which was very urgently insisted upon by his counsel, was that Section 4 of the Act required him to make this repair at this point, even without a jack, and even when obviously dangerous

for him to attempt to do so. It will be observed that plaintiff's claim that he was required to make the repair was because of the Safety Appliance Act. He did not claim that there was any particular instruction from defendant to make even this particular class of repairs rather than to shop the car. The fact that the plaintiff conceived it to be his duty to make the repair because of his misconception of the provisions of the Safety Appliance Act may be a very unfortunate thing for the plaintiff, but it certainly is no reason for imposing any liability upon the defendant. The cross-examination of Jones did not shake him from his position that the Act did not require these repairs to be made there, when Lorick could not make them, notwithstanding that, though a layman, plaintiff's counsel was permitted to examine him as to the correctness of the decision of the United States Supreme Court, which had absolutely no application to the facts of the case.

We cannot state our position or reasoning as well as the Court of Appeals does in *Gowen vs. Harley*, 6 C. C. A., 190, 56 Fed., 973. See 6 C. C. A., pages 198-199.

The defendant in error relies upon the decision of this Court in *Seaboard Air Line Railway against Horton*, 239 U. S., 595. The distinction between the Horton case and the case at bar is obvious. In the Horton case the engineer was required to run the engine, which forced him to undergo the danger from the explosion of the water gauge, since the Court found that the evidence was not conclusive that the engineer could have avoided this danger by using the gauge cocks. If the evidence had been conclusive that the gauge cocks were safe instrumentalities so that the opportunity to use them furnished plaintiff with a safe way of running the engine, and avoiding the danger of the water gauge, then the Horton case would have been similar to the case at bar. If Horton had had this safe election and then had voluntarily used the gauge, assuming that he knew the danger of it exploding, then clearly he could not recover. But, further, in the case at bar, the danger to plaintiff below was in attempting to use his shoulder and the dan-

ger was so imminent that no ordinary prudent man would attempt it, even assuming that the continuance of his employment depended upon his so doing, and assuming further that there was a promise to furnish a jack for this work.

In the case at bar, in its final analysis, the act that caused plaintiff's injury was that of plaintiff himself, done in the exercise of his own free judgment and not under the compulsion of any instructions from his superior or threat of losing his employment. There was at least an error of judgment on the part of the plaintiff below for which defendant was in no wise legally responsible or liable.

Respectfully submitted,

J. B. S. LYLES,

Attorney for Plaintiff in Error.

INDEX.

CASES CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

No. 762

SEABOARD AIR LINE RAILWAY, PLAINTIFF IN ERROR.

vs.

J. H. LORICK, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

Now comes the defendant in error, J. H. Lorick, by his counsel, Frank G. Tompkins and George Bell Timmerman, appearing in his behalf, and moves the Court to dismiss the writ of error in the above entitled cause, for want of jurisdiction and upon the grounds set forth in the brief filed herewith.

The defendant in error further moves the Court to affirm the judgment rendered by the Supreme Court of the State of South Carolina upon the ground that it is manifest that the writ of error was taken for delay only, and that the questions on which the decision of the cause depends are so frivolous as not to need further argument.

The defendant in error further moves the Court in the event that it should desire to hear argument on the questions involved, that this cause be transferred to the summary docket, and there be proceeded with upon the ground

that the cause is of such a character as not to justify extended argument.

The grounds of this motion, the statement of the case and the arguments thereon are more fully set forth in the accompanying brief, all of which is respectfully herewith submitted.

FRANK G. TOMPKINS,
GEO. BELL TIMMERMAN,
Attorneys for Defendant in Error.

Columbia, S. C., December 15, 1916.

To Jo-Berry S. Lyles, Esq., Attorney for Seaboard Air Line Railway, Plaintiff in Error:

YOU WILL PLEASE TAKE NOTICE that on Monday, the 8th day of January, 1917, at the opening of Court, or as soon thereafter as counsel can be heard, the motion, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for its decision.

Attached hereto please find copy of the motion to dismiss or affirm the brief and argument to be submitted in support thereof, and also the motion to transfer this cause to the summary docket if the Court should desire to hear argument thereon.

FRANK G. TOMPKINS,
GEO. BELL TIMMERMAN,
Attorneys for Defendant in Error.

The foregoing notice is hereby accepted and delivery of a copy thereof, together with the above mentioned motion and brief therein mentioned, are hereby acknowledged this 15th day of December, 1916.

JO-BERRY S. LYLES.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 762.

SEABOARD AIR LINE RAILWAY, PLAINTIFF IN ERROR.

vs.

J. H. LORICK, DEFENDANT IN ERROR.

In Error to the Supreme Court of the State of South Carolina.

STATEMENT OF DEFENDANT IN ERROR.

This action was brought by J. H. Lorick against the plaintiff in error, in the Court of Common Pleas for Lexington County, South Carolina, on May 16, 1914, on the complaint alleging that the defendant was engaged in interstate commerce, and that the plaintiff was employed by them, and also so engaged at the time of his injury, which occurred on the 7th day of May, 1913. The defendant in error set out that he was a car inspector, with duties in the City of Columbia, South Carolina, and at Cayce, Lexington County, South Carolina, and that on said date he was engaged in repairing a coupler to a car marked "Rutland—5263—B," and that he took charge of said car, which was routed to the Rutland railroad in one of the Northern States, after the same had been refused by the Southern Railway, to whom it was tendered for shipment, and commenced to repair a low coupler on account of which the connecting road had refused to receive it.

He further alleged negligence on the part of the plaintiff in error in that he was not furnished with a jack with which to raise such defective couplers as the one here in question, and that he had made demand upon the servants and employees of the defendant in error charged with that duty, and that the said agents, within a reasonable time before his injury, promised to furnish him such, but that the same was never furnished to him, and that in order to make repairs which were necessary, the proper, safe and reasonable way was to raise such couplers with a jack. It was further alleged that not having been furnished such a jack, the plaintiff attempted to raise the coupler, by placing his shoulder under same, and that by reason thereof his shoulder blade was fractured and he was otherwise injured.

The defendant in error answered, denying, for a first defense, all the allegations of the plaintiff's complaint. For a second defense he pleaded that the defendant in error assumed the risk, and for a third defense, pleaded contributory negligence on the part of the plaintiff.

At the first trial the evidence was practically the same as that at the second trial (which is incorporated in the Record), and at the close of the evidence for the defendant in error, the plaintiff in error made a motion for a nonsuit, on the sole ground that the defendant in error had assumed the risk. From an order of the Circuit Court granting a nonsuit, the defendant in error appealed to the Supreme Court of South Carolina and the said order was reversed and remanded to the Circuit Court for trial in an opinion set out at 102 S. C., page 276, which opinion was founded on the law of assumption of risk, as set out by the Supreme Court of the United States, in *Seaboard Air Line vs. Horton,* 233 U. S., 504, and *Bridgett McGovern vs. Philadelphia and Reading Railway Company,* 235 U. S., 389, and the opinion in the Horton case was cited as governing the decision of the South Carolina Supreme Court under the facts of the case.

The action was tried a second time at the November, 1915, term of the Common Pleas for Lexington County

before Judge Sease and a jury, when, at the close of the testimony of both the defendant in error and the plaintiff in error, a motion was made for a direction of verdict on the ground that the defendant in error had assumed the risk, and on the further ground that there was no evidence tending to show any negligence on the part of the plaintiff in error within the allegations of the complaint, having a causal connection with the injuries of the defendant in error under the Employers' Liability Act, which motion was overruled and a verdict was rendered for the defendant in error for damages which he had received from the injury, from which verdict an appeal was taken to the State Supreme Court, which affirmed the same, in the opinion set out in the Record, page 47.

The plaintiff swore at the second trial (and it was substantially the same as at the first) that on the occasion in question he was employed as an inspector under F. N. Jones, as agent of the plaintiff in error, and that his duties consisted of inspecting cars of the plaintiff in error and making such repairs as could be made where they were discovered, to the end that such cars might, under the laws of the United States, continue their movements without his employer being subjected to the penalties consequent upon the violation of such law, and that at the time and place set out in the complaint, a Rutland car which had been routed home, was tendered to the Southern Railway at the interchange yards at Columbia by the Seaboard Air Line Railway, and refused on account of defective couplers and draft bolts. He stated that in accordance with his instructions he attempted to and did repair the said car, after which it was received by the Southern Railway Company and continued on its journey, but that in so repairing it, it was necessary for him to raise the coupler, which was a heavy portion of the said car, with his shoulder, whereas, the customary and reasonably safe way of doing this work was to use a jack, an appliance in common use with the railroad companies for raising material and objects in their operation.

The defendant in error further testified that on several occasions previous to that time he had asked his superior employee, who controlled his work, to furnish him a jack for this particular work, and that he had been constantly promised that such a jack would be furnished, the last time about three weeks before his injury occurred, but that the same had never been furnished to him, and that he customarily needed a jack for this purpose once in a period of time running from one to three weeks.

There was other testimony that he had not been furnished such a jack; in fact, it was not denied by the plaintiff in error, and there was also further testimony that he had asked his superior employee for a jack, which was not given him.

The defendant in error and other inspectors denied that he had ever promised to furnish this party a jack, but claimed that he had told him he could get a jack at the yard at Cayce, which was across the river about one and one-half miles from the place where the plaintiff in error was employed, in the City of Columbia. He admitted that he had instructed the defendant in error to do all the work he could possibly do on the cars, of the character here in question, and what he could not do to send it to the rip track (Record, page 42); that he had helped to raise draw heads and low couplers without the use of the jack (Record, page 42), and that it would have been better to have had a jack to raise it (Record, page 42), and that they had ordinary light jacks for doing this kind of work on the rip track (Record, page 43), which appeared to have been a track on which cars were placed for repair when they were found to be defective in such particulars as that they could be removed to other places.

Argument.

It is manifest, from an examination of the assignments of error, that the purpose of this appeal is for delay only.

There are four assignments of error.

FIRST AND SECOND ASSIGNMENTS OF ERROR.

These assignments of error complain that the Supreme Court of South Carolina erred in failing to find that the Circuit Court should have granted a direction of verdict or nonsuit on the ground that there was no reasonable inference which could be drawn from the testimony, except that the defendant in error had assumed the risk of any attempt to lift the coupler with his shoulder.

As the Court practically reaffirmed the opinion in the previous hearing in the case as to the assumption of risk, and gave it no elaborate discussion in the second appeal, we deem it advisable to quote as follows from the opinion in the first appeal. See 102 S. C., page 280:

> "It is the settled law of this State that the servant assumes the ordinary risk incident to his labor, but he does not assume such risks as may be caused by the master negligently failing to furnish suitable appliances to perform his work, but if the servant continues in the service with knowledge of such defective appliances, he is deemed to have waived the master's negligence and to have assumed the risk in spite of the master's negligence; but if he complains of and calls attention to the defect, and there is a promise on the part of the master to furnish such suitable appliances as it is his duty to do, and the employee, while remaining thereafter in the master's service is injured, it is a question for the jury to determine whether the employee, by remaining in the master's service, assumes such risk.
>
> " 'The remaining in master's service by an employee, after knowledge of an alleged defect in the instrumentalities to be furnished by the master, is not, as a matter of law, an assumption of risk by the employee. Whether the employee assumed the risk is a question for the jury, to be determined from all the circumstances of the case.' *Mew vs. Railroad Company,* 55 S. C., 101, 32 S. E., 828.
>
> "A promise by the master to remedy a defect tends to rebut the inference of waiver of the defect by the servant's remaining in the master's service after knowledge. If the servant continued in discharge of

his duties, relying on the master's promise to remove the defect, he could not be said to have waived such defect. The jury was the tribunal to determine the question in this case. *Powers vs. Oil Company*, 53 S. C., 363, 31 S. E., 276. As to the same principle, see *Bodie vs. Railway Company*, 61 S. C., 478, 39 S. E., 715; *McCarley vs. Manufacturing Company*, 75 S. C., 390, 56 S. E., 1; *Hankinson vs. Railroad Company*, 94 S. C., 154, 77 S. E., 863.

"The law of assumption of risk, as settled by the Supreme Court of the United States in *Seaboard Air Line Ry. vs. Horton*, 233 U. S., 504, 34 Sup. Ct. Reporter, 635, 58 Law Ed., 1070, 55 L. R. A. (N. S.), 1915c, 1 36 A. & E. Ann. Cas., 1915b, 475, is as follows: . . . Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them. These distinctions have been recognized and applied in numerous decisions of this Court. (Here the Court cites number of cases.) . . .

"When the employee does not know of the defect, and appreciates the risk that is attributable to it, then if he continues in the employment without objection or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employee assumes the risk, even though it arises out of the master's breach of duty. If, however, there be a promise of reparation, then during such time as may be reasonably required for its performance, or until the particular time specified for its performance, the employee, relying upon the promise, does not assume the risk unless at least the danger be so imminent that no ordinarily prudent man under

the circumstances would rely upon such promise. (Here the Court cites number of cases.)

"It has also been held where there is a conflict of testimony as to the assumption of risk, it is a question to be decided by the jury.

"This has always been the law of this State, and so, also, determined by the Supreme Court of United States in *Bridgett McGovern vs. Philadelphia and Reading Railway Company,* 235 U. S., 389, 35 Sup. Ct. R., 127. So neither under the State law, nor under the Federal law could this issue be determined without submission to the jury. His Honor was in error in granting the nonsuit, and the order of nonsuit must be set aside and reversed."

It will be seen that the decision of the Court was based on the case of *Seaboard Air Line Railway vs. Horton,* 233 U. S., 504, and *Bridgett McGovern vs. Philadelphia and Reading Railway Company,* 235 U. S., 389. This rule has received the subsequent approval and elaboration of the Court. In *Seaboard Air Line Railway vs. Horton,* 239 U. S., at page 595, where it was held to be a question of fact for a jury to determine whether the promise of repair of a defective appliance had been made within a reasonable time, and whether such danger was so imminent as to prevent a reasonable man from undertaking it, even though this promise had been made.

The Supreme Court of South Carolina held, in the opinion herein, that:

"There was ample evidence to go to the jury for them to determine whether the defendant had promised to furnish the jack and whether the defendant was negligent in failing to do so, and whether or not the plaintiff was coerced and induced to do the work without the aid of such suitable tools under the threat of the representative of the master to discharge him unless he did perform the work. It was for the jury to determine whether the plaintiff was required by his superior to make the repairs on the spot."

The plaintiff testified that he could not send this car to the shop under his instructions without violating the Safety Appliance Act, as it was one of those repairs which could be made on the spot (Record, page 27), and that he found it necessary to raise these low couplers once in from one to three weeks' time (Record, page 17), and that while he had never been furnished these jacks, he had instructions to fix these low couplers, and not send the car to the shop (Record, page 28) where the following occurs:

> "Q. How do you expect to tell the jury whether you could fix a safety appliance or anything else yourself? A. I had instructions to fix them.
>
> "Q. You had to fix what you could? A. I had instructions to fix cars with low couplers and not let any come back.
>
> "Q. And if you could not fix them you were to send for help? A. He said if I could not fix them he would put a man there that would fix them.
>
> "Q. You were expected to fix things that you could not fix? A. No, sir.
>
> "Q. They did not think you were supernatural; Mr. Jones thought you were supernatural? A. He just told me to fix those special cars."

Mr. Jones, the representative of the master, testified that the defendant in error had been given instructions to make all repairs that he could possibly do to get the cars out, and that they should not be sent to the shop if he could make the repairs himself (Record, page 34), and that the defendant in error had requested him to give him a track jack (Record, page 37), and that a jack would possibly have worked better under the circumstances here in question (Record, page 42), and that they used them on the rip track for jacking up draw heads (Record, page 41) and that he had helped to raise draw heads without the use of the jack (Record, page 42).

The Circuit Court of the Supreme Court held that there was sufficient evidence to go to the jury on the question of whether the defendant in error assumed the risk in this

case, and this Court has held that they will not disturb such a finding unless it was palpably erroneous. *Chesapeake and Ohio Railroad Company vs. Carnahan,* 441 U. S., 237; *Great Northwestern Railway Company vs. Knapp,* 240 U. S., 464; *Chicago Junction Railroad Company vs. King,* 222 U. S., 222. It has also been held that the question of assumption of risk is for the jury, where there is any conflict of testimony, which the Supreme Court of South Carolina says existed here. *C. & O. Railroad Company vs. D. Atley,* 241 U. S., 210; *C. & O. Railroad Company vs. Profit,* 241 U. S., 462; *Chicago and Northwestern Railway vs. Bower,* 241 U. S., 470; *Baughan vs. N. Y. P. Railway Co.,* 241 U. S., 237. This Court has also held that the weight and tendency of the proof would ordinarily be left to the State Court in an appeal of this kind. *Great Northwestern Railway Company vs. Knapp,* 240 U. S., 464. As is clearly set out in the case of *Kanawha & M. R. Co. vs. Kerse, supra,* "the burden of proof of the assumption of risk was upon defendant, and unless the evidence tending to show it, it was clear and from unimpeachable witnesses, and free from contradiction, the trial court could not be charged for error in refusing to take the question from the jury."

THIRD ASSIGNMENT OF ERROR.

This assignment complains of error in the Supreme Court of South Carolina and the Circuit Court, which was affirmed, in failing to direct a verdict upon the ground that there was no evidence tending to show negligence having a causal connection with the injury of the plaintiff.

The defendant in error testified as follows:

> "Q. What, then, became necessary to be done before they would take it? A. I had to repair the car before they would take it. Q. Why did you not take it to the shop? A. There were no shops over there. Q. Did you have a right under the instructions you had, to carry it to the shops at Cayce? A. No, sir. Q. You

had to make the repairs right then? A. Yes, sir. Q. What kind of tools were necessary to properly and safely raise that coupler and fix those draft bolts? A. Jacks. Q. One of those things that you turn around and raise things up with? A. Yes, sir; the same as the section masters have we are supposed to have; the jacks with a lever. Q. Did you have one of those? A. No, sir. Q. Had you ever asked your foreman for one? A. Yes, sir. Q. Who was your foreman? A. Frank Jones. Q. You had asked him for one? A. Yes, sir. Q. State whether or not he had promised to give you one? A. Yes, sir. Q. Had he given it to you? A. No, sir. Q. About how long before this accident was it you asked him for a jack? A. It was about a month or something like that. Q. About how often was it necessary for you to have a jack to fix those things; about how often did these things pull out? A. Sometimes it would be several weeks before you would need one, and then sometimes two or three weeks at a time. Q. Not having these jacks, what did you do? A. I squatted down in front of the coupler and raised it up. Q. How? A. With my shoulder, and put a carry-on, a piece of iron, underneath it to raise it high enough. Q. What happened to you as you raised it up? A. After I raised it up with my shoulder, my arm looked like it went to sleep, and I rubbed out the bad order marks on the car and then my left arm felt like it went to sleep and I went on the rest of the day, and that night it got to paining me like it was sprained, and I came back to work the next day and could hardly use it, and the next morning Mr. Jones came over and I told him I sprained my arm. (Record, page 17.)

"Q. You complained to Mr. Jones several times about not having a jack? A. Several times; a number of times. Q. What would he say on each occasion? A. He said he did not have any at the time but would get them. (Record, page 25.)

"Q. You had to fix what you could? A. I had instructions to fix cars with low couplers and not let any come back. Q. And if you could not fix them you were to send for help? A. He said if I could not fix them he would put a man there that would fix them. (Record, page 28.)

The witness, S. G. Elders, testified as follows:

"Q. What conversation did you hear between Mr. Lorick and Mr. Jones about that jack? A. I heard Mr. Lorick ask him for a jack to take to the joint yard, and he told him that he did not have any jacks. (Record, page 30.) Q. You know that Mr. Jones is the man that is charged with having failed to furnish these jacks? A. Yes, sir, he is supposed to furnish them; I know that. Q. And if any one is at fault he is at fault? A. He is the one that is supposed to furnish the jacks. Q. You know if any one is at fault he is at fault? A. Yes, sir. He could have given him the jacks. (Record, page 32.)

F. N. Jones, the only witness for the defendant, testified:

"Q. What instructions had you given him; what sort of repairs was he to do on those cars in that yard? A. All repairs he could possibly do to get the cars out. Q. To have them accepted by the other roads? A. Yes, sir. Q. Do you say that Mr. Lorick had to report to you before going to work in the interchange yards in the mornings? A. Not always. (Record, page 34.)

"Q. As to the character of the repairs that Mr. Lorick was undertaking there, tell us what repairs he was to make? A. All the repairs that he possibly could make. Q. If he could not make the repairs, what was to be done with the cars? A. Put a shop tag on it and send it back to the shop track. (Record, page 34.)

"Q. What did Mr. Lorick ask you on that occasion? A. He asked me for a track jack, a light one, he could not use the switch jack; that he did not want to have a heavy jack, and I told him I had two, to take one; I was boarding right close to the yard, and he asked me the same question after he came back to work, after he was injured, and that was after we moved to Cayce. (Record, page 37).

"Q. Did you have a jack there that Mr. Lorick could have gotten? A. The track jack he asked for and I told him he could get it. Q. That was in Columbia? A. Yes, sir. Q. After you moved to Cayce did you have a track jack that he could have gotten? A. Yes, sir. (Record, page 37.)

"Q. You do not mean to say it would not have been better to have had a jack to raise it? A. A jack would have possibly worked better there; I do not know about that. (Record, page 42.)

"Q. Where are your track jacks kept there? A. The section men keep the main jacks on the sections. Q. What were you doing with it? A. I had ordinary light jacks to do light work. Q. What were you doing? A. We used them there for light work, like jacking up a draw head; the company furnished a heavier jack for the repair men. Q. And that is all you had to do with the jacks you had, was just such work as Mr. Lorick was doing? A. No, sir, we had to put wheels under the railroad cars and take the trucks out. (Record, page 43.)

"Q. You are talking about what the car inspectors had to do; what did your office have to do with jacks except what Mr. Lorick wanted with it? A. To do work with. Q. What did you want with them? A. To do work with. Q. But you did not give him one? A. They were on the rip track; we always used two on the rip track for light work." (Record, page 43.)

It will be seen from the above exerpts from the testimony that the Supreme Court of South Carolina was justified in their finding, that there was ample evidence to go to the jury on the question of negligence of the plaintiff in error in failing to furnish jacks for the purpose of raising defective couplers (Record, page 46), and, in fact, no where in the case does it appear, even by implication, that the use of jacks would not have been proper in a case of this kind.

The only witness for the plaintiff in error (F. N. Jones) no where in his testimony stated that the jacks were not necessary or that they would not have been necessary in the exercise of due care on the part of the master. The defense, as testified to by him, seemed to be based upon the fact that the defendant in error should have sent the car to the shop for these repairs, though it was clearly shown that they were of such a nature that under the Safety Appliance Act they could not have been carried to the shop, but must have been repaired on the spot.

This Court has held that where the Circuit and Supreme Courts of a State have held evidence sufficient for the jury, it will not be reversed unless palpably erroneous. *Great Northwestern Railway Company vs. Knapp,* 240 U. S., 464, and that "the employer is under a duty to exercise ordinary care to supply machinery and appliances reasonably safe and suitable for the use of the employee." *Chicago & N. W. Railway Company vs. Bower,* 241 U. S., 470; citing *Washington & G. R. Company vs. McDade,* 135 U. S., 554; 570, 34 L. Ed., 235, 241, 10 Sup. Ct. Rep., 1044; *Patton vs. Texas & P. R. Co.,* 179 U. S., 658; 664, 45 L. Ed., 361, 364, 21 Sup. Ct. Rep., 275.

Fourth Assignment of Error. This assignment complains of error in the Supreme Court of South Carolina in adjudging that the Safety Appliance Act required the plaintiff in error to make repairs of the kind here in question at the point where they were discovered.

We do not deem that the Court will take this assignment of error seriously, in view of the fact that it must be admitted that the construction put upon the Act by the State Supreme Court is that which has received the sanction of this Court. *U. S. vs. Erie Railroad,* 237 U. S., 339, and all that the State Supreme Court had to say with regard to this Act was to quote from the opinion of the United States Supreme Court in the above mentioned case. As a matter of fact, this portion of the opinion of the Supreme Court was not strictly in response to any of the exceptions taken by the plaintiff in error here when the case was before the South Carolina Supreme Court, and it might be entirely eliminated from the opinion without in any way affecting its discussion of law on the points raised by the plaintiff in error.

As a matter of fact, the evidence conclusively shows that the defendant in error claimed that he had instructions to make all repairs that he could make at the point where they were discovered, and without sending the cars to the shop. This testimony was substantiated by the testimony of Jones, the only witness for the plaintiff in error, where

he said that he had given the defendant in error instructions to make all repairs he possibly could without sending same to the shop (Record, page 34).

The attention of the Court is called to the fact that the opinion of the Supreme Court of South Carolina was unanimous, though one of the justices based it on the authority of the former decision in this case, in which decision he dissented on the ground that he thought the injury was the result of the plaintiff's own negligence, which point was not before the Court in that particular appeal.

It will be noted also that the case was tried under the Employer's Liability Act, and no exception was taken to the charge of the presiding Judge construing that law, so that it must be taken that the requirements of the statute were complied with in every respect, save the two questions raised by the assignments of error.

FRANK G. TOMPKINS,
GEO. BELL TIMMERMAN,
Attorneys for Defendant in Error.

Note: Permission was granted the plaintiff in error to incorporate the opinion of the South Carolina Supreme Court in the first appeal in the Record, it having been inadvertently omitted.

SEABOARD AIR LINE RAILWAY *v.* LORICK.

ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

No. 762. Argued April 10, 1917.—Decided April 23, 1917.

In an action in a state court under the Federal Employers' Liability Act, it was in evidence that the employee, in the line of his duty, was injured in an effort to raise a coupler without the aid of a jack; that a jack was the proper appliance for such work; that he had requested one of his superior repeatedly on former like occasions and that it had been promised him a few weeks before the accident. The court below having affirmed the action of the trial court in refusing to direct a verdict for defendant upon the grounds of assumption of risk and absence of negligence, *Held*, that there was no clear and palpable error such as would justify this court in disturbing the verdict for the plaintiff. *Baltimore & Ohio R. R. Co.* v. *Whitacre*, 242 U. S. 169, 171.

THE case is stated in the opinion.

Mr. J. B. S. Lyles for plaintiff in error.

Mr. Frank G. Tompkins, with whom *Mr. Geo. Bell Timmerman* was on the brief, for defendant in error.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The Federal Safety Appliance Acts (as supplemented by Act of April 14, 1910, c. 160, 36 Stat. 298, 299) prohibit a carrier engaged in interstate commerce from hauling a car with a defective coupler, if it can be repaired at the place where the defect is discovered. *United States* v. *Erie R. R. Co.*, 237 U. S. 402, 409. The Seaboard Air Line Railway received such a car at one of its yards. Lorick, the local car inspector and repairer, who discovered the defect, undertook to make the repairs, as was in the line of his duty. To do so it was necessary to raise the coupler; and for this a jack was the appropriate appliance. None having been furnished him, he sat down under the coupler and raised it with his shoulder which was thereby seriously strained. Occasion to make similar repairs had previously arisen at this yard at short intervals. Lorick had for this purpose repeatedly asked the chief car inspector for a jack; and a few weeks before the accident had been promised one. Lorick sued the company under the Federal Employers' Liability Act in a state court of South Carolina and testified to the facts above stated.

The case was tried twice before a jury and was twice reviewed by the Supreme Court of South Carolina. At the first trial the court directed a nonsuit on the ground that Lorick had assumed the risk. The Supreme Court set aside the nonsuit (102 S. Car. 276) holding that in view of the promise to supply a jack, the question of assumption of risk should have been left to the jury, citing *McGovern* v. *Philadelphia & Reading Ry. Co.*, 235 U. S. 389. At the second trial defendant asked for a directed verdict on the grounds both that Lorick had assumed the

risk and that there was no evidence of negligence on defendant's part. This request being refused, the case was submitted to the jury under instructions which were not objected to; and a verdict was rendered for plaintiff. Defendant's exceptions to the refusal to direct a verdict were overruled by the Supreme Court. The case comes here on writ of error where only these same alleged errors may be considered.

The appellate court was unanimous in holding that the trial court had properly left the case to the jury. No clear and palpable error is shown which would justify us in disturbing that ruling. *Great Northern Ry. Co.* v. *Knapp*, 240 U. S. 464, 466; *Baltimore & Ohio R. R. Co.* v. *Whitacre*, 242 U. S. 169, 171. The judgment is

Affirmed.

MR. JUSTICE VAN DEVANTER and MR. JUSTICE MCREYNOLDS dissent.